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"Justice for the injured worker"

Representing Victims of On-The-Job-Accidents

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Robert E. Wisniewski is a Certified Specialist, Workers' Compensation, Arizona Board Legal Specialization. Since 1976, Mr. Wisniewski has devoted his practice to the representation of Arizona injured workers at more than 12,000 Industrial Commission Hearings, statewide in Arizona from his main office in Phoenix. He is a Fellow, The College of Workers' Compensation Lawyers and Super Lawyer. He has represented both the Industrial Commission of Arizona and SCF Arizona as Special Counsel. In addition, he has consulted and associated on workers' compensation lien issues/negotiation cases. He accepts referrals statewide and has litigated cases in every county in Arizona.

He has litigated civil personal injury cases, both plaintiff and defense. He is conversant with lien practicalities and civil interface with workers' compensation.

In a prior life, he represented casualty/automobile insurance carriers in both civil personal injury cases and workers' compensation claims. Occasionally, he will represent a workers' compensation carrier and/or non-insured employer. He has also testified in state and federal courts as an expert witness and bad faith workers' compensation/standard of care, damages and legal malpractice for both Plaintiffs and Defendants.

He is a Board Member of Kids Chance of Arizona, a scholarship program for children of injured Arizona workers.

He has lectured and written on Arizona Workers' Compensation Lien Law for over 24 years and maintains a blog at www.Azhurtonthejob.com with updated lien information. He welcomes inquiries from attorneys.



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THE COMPLETE GUIDE TO ARIZONA WORKERS' COMPENSATION LIEN LAW AND PRACTICE (Copyright 2019 ©)

STATE BAR OF ARIZONA ANNUAL WORKERS' COMPENSATION CLE PROGRAM

AZ WORKERS' COMPENSATION LIENS 2019:

"THE GOOD, THE BAD AND THE UGLY"

"You are not in a position to ask for anything."

--- George Harris: *Katanga (Raiders of the Lost Ark 1981)*.

SEPTEMBER 26, 2019, PRESCOTT, ARIZONA

ROBERT E. WISNIEWSKI, ESQ.

LAW OFFICES OF ROBERT E. WISNIEWSKI, P.C.

OUTLINE

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**(Updated 9-1-2019)

1. The Statute

Workers' Compensation Carrier (or self-insured/No Insurance, Special Fund of the Industrial Commission of Arizona) has a **statutory** lien. (A.R.S. § 23-1023A, B & C).

§23-1023. Liability of third person to injured employee; election of remedies (2007)

23-1023. Liability of third person to injured employee; election of remedies

A. If an employee who is entitled to compensation under this chapter is injured or killed by the negligence or wrong of another person not in the same employ, the injured employee, or in event of death the injured employee's dependents, may pursue the injured person's remedy against the other person.

B. If the employee who is entitled to compensation under this chapter or the employee's dependents do not pursue the remedy pursuant to this section against the other person by instituting an action within one year after the cause of action accrues, or if after instituting the action, the employee or the employee's dependents fail to fully prosecute the claim and the action is dismissed, all of the following apply:

1. The Insurance carrier or self-insured employer may institute an action against the other person.
 2. Any **dismissal** that is entered for lack of prosecution of an action instituted by the employee or the employee's dependents shall not prejudice the right of the insurance carrier or self-insured employer to recover the amount of benefits paid.
 3. If the statute of limitations of the claim is one year after the cause of action accrues, the insurance carrier or self-insured employer **may file the action prior to one year after the cause of action accrues.**
 4. The claim may be prosecuted or compromised by the insurance carrier or the person liable for the self-insured employer or **may be reassigned** in its entirety to the employee or the employee's dependents. After the reassignment, the employee who is entitled to compensation, or the employee's dependents, shall have the same right to pursue the claim as if it had been filed within the first year.
- C. The employee or the employee's dependents shall provide the insurance carrier or the self-insured employer **written notice** of the intention to bring an action against a third party and shall provide to the insurance carrier or self-insured employer **timely and periodic notice** of all pleadings and rulings concerning the status of the pending action. In any action instituted by the employee or the employee's dependents, the insurance carrier or the self-insured employer shall have the **right to intervene at any time** to protect the insurance carrier's or the self-insured employer's interests.

D. If the employee proceeds against the other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or the other person liable to pay the claim shall have a lien on the amount actually collectable from the other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing the recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by this chapter for the case. Compromise of any claim by the employee or the employee's dependents at an amount less than the compensation and medical, surgical and hospital benefits

provided for shall be made only with written approval of the insurance carrier or self-insured employer liable to pay the claim.

E. For purposes of this section, the Industrial Commission shall have the same rights as an insurance carrier or self-insured employer. (Emphasis added).

NOTE: 2007, 2012, 2014 STATUTORY CHANGES

2007

With a failure to prosecute or a dismissal because of plaintiff sleeping on his or her rights, the changes beefed up the carrier's rights to protect its lien interest by allowing the carrier to:

- Institute an action
- Providing that lack of prosecution will not be dismissed with prejudice
- If a one-year statute of limitations, the carrier may file within that one year
- Reassignment is resurrected

Also:

- Plaintiff is obligated to provide periodic and timely notice of all pleadings and rulings/case status.
- Carrier is provided the right to intervene, *see* State Compensation Fund v. Fink, infra. (SCF now called CopperPoint Ins. Co.)

2012

2012 amendment became effective on August 2, 2012, which expanded the lien against third-party recoveries to circumstances where negligent third party further aggravates a previously accepted industrial injury.

Subsection D clarifies that the lien shall apply only to amounts expended for compensation and treatment of the aggravation.

2014

Acosta v. Kiewit-Sundt, 234 Ariz. 75, 316 P.3d 1263 (App. 2014). Acosta said no reassignment required, analyzing A.R.S. § 23-1023(D), revised 2007.

Division I decided the 2007 amendments took away the carrier's automatic assignment in the second year of the cause of action. It held the 2007 amendment, therefore, did not divest the plaintiff of the cause of action.

The original drafters of the 2007 amendment thought the language "deemed assigned" was superfluous and that those four paragraphs were intended to expand the carrier's rights, not take away the automatic assignment. The net result was chaos, leaving parties to determine the status of assignments and reassignments in cases since 2007, which are not yet final.

Any doubt regarding the assignment to the carrier of the second year of the cause of action is eliminated, but questions remained regarding the status of not as yet final cases between the date of the Acosta decision, January 23, 2014, and July 24, 2014, the effective date of HB2094. The Acosta court

was interpreting the 2007 amendments, not creating law, so the decision was retroactive to 2007. Court of Appeals on September 23, 2014 depublished Acosta, 335 P.3d at 1118).

Although one may try to argue that the “new” reassignment in HB2094 is not a substantive right, rather it merely provides a procedural right, it may very well be that it actually creates, regulates, or enforces a right and is therefore substantive. See State Compensation Fund of Arizona v. Fink.

NOTE: (a) In State Compensation Fund of Arizona, dba SCF Arizona v. Hon. Dean Fink/Juan Manuel Lopez-Verduzco, filed 7/01/2010, 224 Ariz. 611, 233 P.3d 1190 (App. 2010), the Court held that the worker’s compensation carrier can intervene in tort case applying A.R.S. § 23-1023(C) (Supp. 2009) retroactively to protect intervening carrier’s interest as a procedural right.

2. Purpose of Lien

a. Avoid giving the injured employee double recovery. Payor of compensation benefits is given a lien on third-party recovery to the extent of all compensation and medical benefits paid, and a **credit** that acts as a deductible against future compensation liability, both medical and indemnity, for the amount of the net recovery plaintiff receives (unless otherwise negotiated). Lien is to encourage suit against culpable third parties. Aitken v. Industrial Commission of Arizona, 183 Ariz. 397, 904 P.2d 456 (1995).

b. Pay, Reimburse and Credit. [R]equire the third party *to pay* what he would normally pay if there was no workers' compensation, *to reimburse* the carrier for its compensation expenditure, and *to allow* the compensation beneficiary *to enjoy* the excess of the damage recovery after compensation. 2A A. Larson, Workers' Compensation §74.16(a) (1983) cited in Mannel v. Industrial Commission of Arizona 142 Ariz. 153, 688 P.2d 1045 (App. 1984), cert. den. 469 U.S. 1212 (1985) (emphasis supplied).

...[L]ien is exception to the general rule that an insurance company may not be an assignee or a subrogee of its insured's tort claim. Talley v. Industrial Commission of Arizona, 137 Ariz. 343, 670 P.2d 741 (App. 1983).

c. Lien is automatic. [Statutory]

i. Once recovery against a third party is received, the lien automatically comes into being. Carrier does not need to act to establish reimbursement right. Carrier does not need to be made a payee on settlement check or draft.

ii. Lien exists whether claimant reaches settlement, or trial or arbitration with third-party.

d. Lien attaches at the time of the third-party settlement agreement. SCF v. Ireland, 174 Ariz. 4590, 851 P.2d 115 (App. 1992).

PRACTICE HINT: Ask for lien printout from Workers’ Compensation Carrier. Examine the alleged workers' compensation lien to eliminate expenses other than compensation (indemnity) and medical treatment, e.g. attorneys' fees, nurse consultants, vendor costs; independent medical exam (IME) costs, defense medical exam (DME), defense attorney’s fees, nurse case manager’s fees, etc. Look to any settlement documents made in underlying worker’s compensation case to see if settlement amount is specifically included into lien. If not added into lien in settlement documents, then not part of lien amount. (See also Section 6(e), *infra.*)

3. Nature of Lien

a. Carrier's lien extends to total third-party recovery less necessary costs and attorney's fees, including the portion attributable to a spouse's loss of consortium (A.R.S. § 23-1023(C); **Mannel v. Industrial Commission, supra.** Even though this recovery includes damages not compensated under workers' compensation (such as pain and suffering, loss of pleasure in life and a spouse's loss of consortium)." 688 P.2d at 1048. See also, **Hendry v. ICA, 112 Ariz. 108, 538 P.2d 382 (1975).** Recognizing the "inequity" this case says there is no other choice as the statute applies to the full recovery, including damages for non-workers' compensation elements such as pain and suffering. See also, **Liberty Mutual Insurance v. Western Casualty & Surety Co., 111 Ariz. 259, 527 P.2d 1091 (1974).** Medical malpractice action, the amount "actually collectable" applies to damages sustained both before and after the malpractice was committed.

b. Carrier's lien extends to the total amount actually collectable. A.R.S. § 23-1023(D). If in a workers' compensation compromise agreement the settlement amount of a disputed part of claim **is not specifically included in lien**, such amount cannot be included in lien. **EBI, Inc. v. ICA, 178 Ariz. 624, 875 P.2d 857 (App. 1994).** Carrier is under no contractual duty to reduce lien to maximize injured party's benefit. **Boy v. Fremont Indemnity Co., 154 Ariz. 334, 742 P.2d 835 (App. 1987).**

c. 3.(C) Arizona allows reduction of Workers' Compensation lien by the percentage of fault assigned to the employer – but limited cases to those only tried to a verdict. (**Aitken v. Industrial Commission of Arizona, 904 P.2d 456 (Arizona, 1995).** Cert. denied, 517 US 1208).

After Arizona abrogated joint and several liability in favor of comparative fault, **Aitken** recognized that the lien statute “may work an injustice on the injured worker because the injured worker can’t sue the employer”. After the recent 2017 case, **Twin City Fire Insurance Company v. Leija** 1CA-CV16-0174 (filed 8-31-2017) (App. 2017), workers’ compensation carriers will have to be more proactive and engage potential subrogation counsel much sooner in order to protect their subrogation or reimbursement rights, and they won’t be able to wait for the trial. In the third party cases, the defendants would routinely try to throw blame on the employer, not only to reduce its own percentage of the fault, but also to allow the opportunity to reduce the Workers’ Compensation lien by a percentage of fault found against the employer by a jury. Because assigning the fault of the employer could only occur with a jury verdict, workers’ compensation carriers would have plenty of time and notice whether the third party case actually proceeded to trial.

In **Twin City Fire Insurance Company v. Leija**, the injured worker was killed while working as a window washer. Twin City Fire Insurance Company was the Worker’s Compensation carrier for the injured worker’s employer and became obligated to pay the widow and dependents monthly workers’ compensation benefits. Several defendants, including the City of Glendale, settled for their policy limits, but did not exhaust the policy limits of the City of Glendale. The Worker’s Compensation carrier did not object to the settlement, but wanted reimbursement of its workers’ compensation lien and supposedly promised to reevaluate its lien position after trial. The plaintiff argued that the lien should be reduced by the employer’s percentage of fault, but since no suit had been filed and no jury had determined such a percentage, the workers’ compensation carrier, Twin City, refused. Twin City filed a complaint for enforcement of its lien and plaintiff, Leija, counterclaimed for bad faith and breach of contract for Twin City’s refusal to reduce its lien.

The appeals court noted that the employer was given several safety violations following the accident and that the estimate of the employer’s percentage of fault “undoubtedly affect the amount the Leija’s were able to recover in settlement”. And as a result, the court announced for the **first time** that after an injured worker settles his or her claims rather than proceeding to trial that did not preclude equitable apportionment of the lien under **Aitken**. The court found that this was not a sham proceeding to reduce the lien, as the settlement did not exhaust the applicable insurance. In light of the

above-mentioned safety citations, the plaintiff, in abundance of caution, settled the case rather than proceed to jury; Aitken requires a promotion of fairness; and the court then said that there would be a trial to establish damages and employer fault. The court found no bad faith and no breach of contract by Twin City for supposedly inducing the plaintiffs to settle and then promising to reevaluate the lien and then refusing to do so.

What you might see is more workers' compensation carriers being proactive regarding the potential percentage of fault and early intervention or examination of the validity of the plaintiff's claim and the amount of damages. The Twin City/Leija Appeals Court concluded as follows: "So long as properly motivated parties are accorded a fair adversarial proceeding conducted in accordance with due process, the concerns of a sham proceeding are avoided". The court also said that it is not a sham because in the trial in the underlying case, the plaintiff will attempt to minimize employer fault and then switch this position in the apportionment trial, but the parties can introduce a variety of information on that subject.

However, the Arizona Supreme Court severely limited the Appeals Court see:

Twin City Fire Ins. Co. v. Leija, 244 Ariz. 493. 422 P. 3d 1033 (2018)

Synopsis: Victor Leija, a window-washer, died in a fall from a building after a scaffold collapsed. His widow and children (the Leijas) applied for, and received, workers' compensation benefits, subsequent to which they filed lawsuits against a number of third parties. During settlement negotiations, the Leijas rejected an offer by the compensation carrier to reduce its lien by 5%, arguing that the employer's comparative fault required a greater lien reduction. Without first resolving this impasse, but with the comp carrier's apparent consent, the Leijas settled with all of the third parties for less than the applicable policy limits. The comp carrier subsequently filed a lawsuit to enforce its lien in full, and the Leijas counterclaimed, arguing that the carrier was acting in bad faith, and asking the trial court to set a trial to establish the degree of the employer's comparative fault. The trial court ruled in favor of the comp carrier. The Court of Appeals reversed, holding that "when a worker settles a claim against a third party for less than the limits of the third party's insurance, the worker may obtain a judicial determination of whether the carrier's lien should be reduced to account for the employer's comparative fault" The Arizona Supreme Court granted review.

Issue: Is a claimant who settles a third-party claim entitled to a post-settlement trial to determine the extent of the employer's comparative negligence?

Holding: No. The doctrine of equitable apportionment applies only when a claimant's total damages have been fixed by verdict. Neither the applicable statutes nor prior case law authorize a post-settlement trial. It is speculative to assume that when a third party settles for less than policy limits, the recovery has been reduced by the employer's own negligence. A post-settlement trial invites the claimant to engage in possible gamesmanship by incentivizing the claimant to maximize the fault attributable to the employer, thus reducing the carrier's lien.

Memorable Quote: "[W]e recognize that even in a settlement context, an insurance carrier has an obligation to act in good faith toward a claimant by giving equal consideration to the claimant's interests Under these circumstances, as amicus CopperPoint Insurance Company acknowledged at oral argument, good faith might entail request to reduce the lien on third-party settlement proceeds, particularly when evidence of employer fault is clear, undisputed, and substantial."

PRACTICE HINT: Begin negotiations on lien reduction early and use Twin City logic.

PRACTICE HINT: Check with workers' compensation carrier to see if a compromise agreement exists. Check language of any settlement in workers' compensation case to ensure amount is specifically included in lien; if not, not part of lien.

PRACTICE HINT: Negotiate (if possible) with workers' compensation carrier to reduce existing lien. Try to increase net recovery to client. Workers' compensation carrier's motivation is to close file and never pay again. Greater net to client may achieve so high of a "deductible future credit" to effectively foreclose future workers' compensation payments. Try to negotiate waiver of lien credit on all future expenses, or at least a compromise/waiver on future medical expenses. Document all efforts to reduce lien, or credit, **memorialize in writing**. Parties may make any agreements regarding the reduction of the lien, amount of future credit or how lien future credit is applied. **Hartford v. Industrial Commission, 178 Ariz. 106, 870 P.2d 1202 (App. 1994).**

c. **EXPLAIN TO YOUR 3RD PARTY CLIENT, FUTURE CREDIT EXISTS AND EXTINGUISHES, FOR ALL PRACTICAL PURPOSES, WORKERS' COMPENSATION FUTURE BENEFITS (unless negotiated otherwise). DOCUMENT IN DISBURSAL FORM. (See Attachment #2 herein).**

d. Carrier's credit was attributable to the loss of consortium only to extent that spouse applies for future worker's compensation death benefits. **Martinez v. Industrial Commission, 168 Ariz. 307, 812 P.2d 1125 (App. 1991).**

e. Carrier has future credit on **ALL** future medical and indemnity benefits to the extent of claimant's settlement proceeds if claimant successfully reopens the workers' compensation case, unless otherwise negotiated. **Polito v. Industrial Commission, 171 Ariz. 46, 828 P.2d 182 (App. 1992).**

PRACTICE HINT: In negotiating reductions--do not write letter giving details of pros and cons of your third-party case to workers' compensation carrier while in third-party litigation as letter may be discoverable if client's workers' compensation carrier's file is subpoenaed. Consider as negotiation tactic a reduction of your attorneys' fees, if appropriate. Ask to reduce lien; ask to negotiate future credit and document. **In Re Matter of Swartz, 141 Ariz. 266, 686 P.2d 1236 (App. 1984).** Mandates in clear liability/damages cases where settlement is reached quickly to scrutinize attorney fee recovery. Implies: Ask for lien reduction in each case; offer to reduce fee. Ask for compromise of future credit application. **Document in writing.**

f. When proposed settlement of the third-party claim is for less than workers' compensation carrier's lien, the consent of the carrier is required. See A.R.S. § 23-1023(D), pg. 2, supra; **R20-5-119, R20-5-120, Rules of Procedure Before the Industrial Commission of Arizona. (Attachment #1).** NOTE. This Rule of the Industrial Commission requires notification to Special Fund of the Industrial Commission of Arizona if the employer is uninsured for workers' compensation benefits. A.R.S 23-1023(D) requires same.

g. This consent requirement is true even if workers' compensation has denied the claim and paid zero benefits. See, **Macaluso v. Industrial Commission, 181 Ariz. 497, 891 P.2d 914 (App. 1994), review vacated as improvidently granted, 185 Ariz. 5, 912 P.2d 9, cert. denied 117 Sup. Ct. 63 (1996).** Injured worker filed claim; denied and then Request for Hearing. While personal injury case pending, then settled personal injury case without approval of Special Fund of ICA. **ALL WORKERS' COMPENSATION BENEFITS FORFEITED.** See also, **Hornback v. Industrial Commission, 106 Ariz. 216, 474 P.2d 807 (1970).** Only one exception (later developing severity of injury) seems apparent in **Hornback**: "We recognize that there may be significant differences between this situation and one in

which an employee seeks to reopen a claim for a disability which did not become apparent until long after the settlement of the third-party suit." Hornback, supra at 812.

h. See, Bohn v. Industrial Commission of Arizona, 194 Ariz. 479, 984 P.2d 565 (App. 1999) Workers' compensation claim filed, denied by No Insurance Section of Special Fund Division of the Industrial Commission of Arizona. Hearing affirmed denial. While special action appeal pending on denial of claim, worker settled third party civil claim against homeowner. Court of Appeals set aside the finding-denying claim and found the workers' compensation claim valid. On remand, Special Fund argued forfeiture of all compensation by settling 3rd party without proper approval. Non-insured alleged employer had approved civil settlement but plaintiff lacked Special Fund written approval. Macaluso, supra, concludes in paragraph (g) above it is the law and this is circular reasoning. To allow compensation carriers forfeiture penalties permits too much leverage on 3rd party settlements. It suggests that if carriers prove unapproved settlement was too small, and then allow greater credit to that extent, as well as credit from the settlement itself.

The Supreme Court vacated the Bohn appellate decision (196 Ariz. 424, 999 P.2d 180 (2000), and discussed Hornback, supra, but did not expressly overrule Hornback. The Supreme Court conceded forfeiture an inappropriate remedy in the setting of a denial of a workers' compensation claim, but shifted the burden to the claimant to prove the reasonableness of the settlement if the workers' compensation carrier alleges the settlement was unreasonably low. The claimant must prove any unapproved settlement was reasonable. To the extent that the settlement is unreasonable, the workers' compensation carrier's credit will be increased. See also, Article, "Settling Third Party Claims Without Carrier Approval-Is It Time to Modify the Hornback Forfeiture Rule"? (April 2000, Arizona Attorney, State Bar of Arizona, R. Todd Lundmark, Toby Zimbalist, and Robert E. Wisniewski).

Claimant precluded from reopening claim to receive additional benefits when the medical conditions alleged in the Petition to Reopen were the same conditions as when she settled with third party without obtaining carrier approval. Grinnell v. ICA, 139 Ariz. 124, 677 P.2d 287 (App. 1983).

i. Hendrickson v. Industrial Commission of Arizona, 202 Ariz. 442, 46 P.3d 1063 (App. 2002). Employee accepted \$750.00 from manufacturer of TMJ implant and dismissed doctor in products liability claim. Carrier argued workers' compensation claim barred for failure to seek insured's prior written approval of settlement. Supreme Court vacated Court of Appeals decision, which agreed with carrier. Case is between Hornback and Bohn. Injured employee was on workers' compensation benefits and her recovery was so minimal, then apply the equitable solution of Bohn. Court reminded lawyers to follow A.R.S. 23-1023 or "egregious situations" like Hornback may result in forfeiture of workers' compensation benefits (and one would expect a potential malpractice claim).

j. AAA Cab Service Inc. v. Industrial Commission, 213 Ariz. 342, 141 P.3d 822 (App. 2006). Applicant filed Superior Court wrongful death suit and then a workers' compensation claim for death benefits (employer uninsured for workers' compensation). ICA accepted claim and award went final, no benefits paid. Applicant attempted to withdraw the workers' compensation claim arguing no benefits accepted, and proceed in Superior Court. Court of Appeals rejected election argument of employer under A.R.S. 23-1024(A), stating "only **acceptance of workers' compensation benefits** triggers waiver", and allowed tort filing to proceed.

k. Special Fund Division v. Industrial Commission and Richard Bombara, 226 Ariz. 498, 250 P.3d 564 (App. 2011). Election of remedy case – filed tort claim – dismissed without prejudice, then filed worker's compensation claim, which was accepted. Special Fund/ICA untimely argued under A.R.S. § 23-1024(B) that ICA lacked jurisdiction as the filing of tort claim waived any right to such worker's compensation benefits. Court affirmed prior rulings that election of remedies defense is a non-jurisdictional affirmative defense that can be waived if not timely asserted. Did not discuss if timely raised would there be an election of remedies in filing tort suit first, then dismissing it to file ICA claim.

1. *Pinal County v. Indus. Comm'n*, No. 1 CA-IC 15-0041, 2016 WL 1377738 (Ariz. App. April 7, 2016) (Memorandum Decision).

Synopsis. The claimant settled a third-party claim without first obtaining the insurance pool's written authorization, as mandated by A.R.S. §23-1023(D) and for an amount less than the WC Lien (lien was 88K). The claimant himself had asked his third-party attorney to make sure that he obtained the self-insured pool's permission, but the attorney failed to do so. (He was later disbarred). Also, Pinal County Sheriff's office had a 10 day written notice policy re: pending WC settlements. The claimant offered to give the pool a credit for the amount of this net recovery, (\$4400.00) but the pool insisted that he forfeited his right to benefits for all time as a result of his attorney's error. At hearing, the uncontradicted evidence established that the third-party claim had settled for a fair amount. An ALJ found that forfeiture was an inappropriate sanction, and granted self-insured pool a credit in the amount of the applicant's net recovery. ACIP appealed.

Issue. Did the ALJ abuse her discretion by not affirming suspension of the claimant's benefits?

Holding. The Award of the Industrial Commission is affirmed. The third-party settlement was for a reasonable amount. The failure to obtain ACIP's written authorization for the settlement was not the claimant's fault.

m. FYI – Arizona Attorney General Opinion 64.12, March 6, 1992 – holds that **public** employees do not have the right to reject coverage under the Workers' Compensation Act and sue the public entity.

PRACTICE HINT: Consult periodically with workers' compensation carrier for lien amount and secure specific listing/printout. Examine it for non-statutory amounts (A.R.S. § 23-1023). Get it in writing. **Ask for written approval. Confirm in writing approval, amount of lien payment, and disposition or waiver or compromise of future credits.** The compensation carrier and the Industrial Commission must always be advised of the amount of the settlement or judgment, or compromised lien/settlement/future credit and of the disbursement of the proceeds. **R20-5-119 and R20-5-120** and A.R.S. 23-1023. (**Attachment #1**). See settlement approval form. (**Attachment #2**).

4. Lien Reduction

a. Carrier lien must be reduced by degree of fault attributable to employer in third-party claim. The workers' compensation carrier "may assert a lien on the third party recovery only to the extent the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action." **Aitken v. Industrial Commission, supra.** Do **Aitken** math to demonstrate to carrier potential scenarios of various percentages of fault and impact on potential lien recovery. Under A.R.S. §12-2506(B), employers liable for workers' compensation can designate a non-party at fault in a client's suit against a third party. **Dietz v. General Electric Co., 169 Ariz. 505, 510, 821 P2d 166, 171 (1991).**

b. **PRACTICE HINT:** Even though **Aitken** did not address "rules" governing the compromise of disputed third party claims, "artful contrivances" should not be permitted to reduce or extinguish legitimate lien rights" and cannot have a sham attempt to attribute disproportionate amount of fault to employer. See **Grijalva v. Arizona State Compensation Fund, 185 Ariz. 74, 912 P.2d 1303 (1996).** Even if payments by third-parties are purely gratuitous, they are not exempt from A.R.S. §23-1023. See also, **Stout v. State Compensation Fund, 197 Ariz. 238, 3 P.3d 1158 (App. 2000).**

In attempting to negotiate lien illustrate for workers' compensation carrier **Aitken** math on percentage of FAULT may eliminate/reduce carriers' recovery of the workers' compensation lien.

- c. **See Twin City Fire Ins. Co. v. Leija, 244 Ariz. 493, 422 P. 3d (2018).**
(See also 3.c. *infra.*)

d. Employer's insurer is not required to pay a share of the attorneys' fees of the employee's attorney in collecting workers' compensation lien. **Ruth v. Industrial Commission of Arizona, 107 Ariz. 572, 490 P.2d. 828 (1971).** **Pet. For Rev. denied, Oct. 3, 2001.** In **Hobson v. Mid-Century Insurance Co., 199 Ariz. 525, 19 P. 3d 1241 (App. 2001) Pet. For Review, denied, Oct. 3, 2001.** Division II, Arizona Court of Appeals, held that A.R.S. §23-1023 (C) [Old Statute prior to 9-19-07; C is now D in amended statute] does not permit the workers' compensation lien to be depleted by apportionment of the attorney's fees and costs to collect the lien recovery. Attorneys' fees and costs per A.R.S. §23-1023 (C) come off the total recovery and balance is subject to lien. Court rejected plaintiff's contention that carrier pay one-third of the actual lien recovery as "collection fee" or as part of "common fund." **Excellent discussion of workers' compensation lien law and method of calculating same and net to client, etc.** Court rejected **Labombard** common fund argument carrier case (citation below) and general equitable apportionment argument.

d. Deduct **attorneys' fees and reasonable and necessary costs** of the litigation. The remainder is the amount against which the insurance carrier has a lien. **Liberty Mutual, supra** at 1094. (See Attachment 5, Model Calculation of Lien and Credit).

e. But see, "Common Fund Doctrine" **Labombard v. Samaritan Health System, 195 Ariz. 543, 246, 991 P.2d 246 (App. 1998).** Allows attorneys' fees to be paid to plaintiff's attorney who "collected" hospital's statutory lien commensurate with the pro rata share of work done.

f. **Stout v. State Compensation Fund, 197 Ariz. 238, 3 P.3d 1158 (App. 2000), affirmed in part, reversed in part trial. (Stout I)** Third party settlement for policy limits, one million. Workers' compensation lien \$750,000.00. State Compensation Fund willing to approve settlement of \$245,000.00 paid on lien with full net future credit. Plaintiff contested, arguing that due to overwhelming employer fault, lien should be \$100,000.00. Declaratory action led to appeal. In **Stout I Aitken** Court of Appeals held offset against lien does not apply to settlements *without trial*, as no procedure to determine equitable apportionment. Further, since no actual trial, amount of damages not determined, nor any **judicial** determination of employer fault to reduce damages. Summary jury trial held under **Grijalva, supra.**, a sham. **The amount recovered was determined by policy limits and no evidence employer fault affected the offer to settle at policy limits.** No bad faith in asserting lien to portion of recovery when parties fail to agree on lien compromise. **Lien against loss of consortium not unconstitutional.** Confirmed application of **Martinez, infra.** to proceeds as to wife and son, but reversed as to application of lien to **mother's** recovery as wrongful death statutory beneficiary. All parties petitioned for review with the Supreme Court. Supreme Court entered stay, entertained Petition for Review until Court of Appeals decided **Stout II.** Issue: Can a summary trial extinguish a lien when there is a large percentage of employer fault? (May 2001). **Stout II** involved declaratory and summary trial, judgment over five million. The State Compensation Fund contended under **Grijalva, supra.**, paragraph 3 above this was sham trial. Court rendered judgment in favor of State Compensation Fund. See **Stout II, 202 Ariz. 300, 44 P.3d 178 (App. 2002), amended June 28, 2002, Pet. For Rev. denied 2002.**

Stout II involved a trial to the court to determine fault and damages but a high/low agreement was concluded – minimum to plaintiffs of \$800,000.00 and, no more than \$900,000.00, with the remaining \$100,000.00 of the \$1,000,000.00 liability policy for property damage. The court determined damages in excess of \$5,000,000.00. Twenty five percent of fault allocated to the employer. Plaintiff contended the allocation of \$1,000,000.00 in fault exceeded the \$900,000.00 recovery and thus the State Fund lien was **Aitken** extinguished. Court held the separate trial to determine third party defendants' fault was an exercise designed to "finesse the Fund's settlement approval rights and extinguish its lien rights

with no timely notice to Fund.” **Heed: carrier’s written approval must be obtained even when settlement exceeds amount of lien benefits paid through date of settlement, if future benefits payable may exceed the settlement.** Until legislature addresses **Aitken** issues such as this case there is no specific guidance on how to proceed but, “sweetheart deals must be disclosed” if the agreement has **potential** of affecting manner in which a case is tried. Lastly, lien reimbursement covered by A.R.S. §23-1023(C) attaches to amount actually collectable by high/low agreement, not pursuant to individual damage awards in **Stout I**.

Weber v. Industrial Commission of Arizona, 202 Ariz. 504, 47 P.3d 1142 (App. 2002). Case is hybrid of **Aitken**, **Grijalva**, and **Stout**. Settled with one defendant and proceeded to trial against other defendants. Jury found plaintiff’s employer to be 25% at fault and awarded \$2,000,000.00 in damages. This employer asserted a lien of \$65,000.00 against recovery. **Issue:** Is employer entitled to full recovery against settling defendant’s payment or is there equitable apportionment? Plaintiff’s position: if 25% fault on employer then lien reduced by \$500,000.00 (25% of \$2,000,000.00). Court imposed equitable apportionment under **Aitken**, **infra.**, and adopted plaintiff’s position.

PRACTICE HINT: Find out position of workers’ compensation carrier on liens, lien reduction **before** trial or mediation or arbitration. Try to set up sliding scale.

5. **Structured Settlements and Lien**

a. The Supreme Court described the method of calculating an insurer's credit in cases of structured settlements. **Carter v. Industrial Commission, 182 Ariz. 128, 893 P.2d 1291 (1995),** The insurer sought a current credit for the gross amount of the settlement, which would be paid over twenty years. Worker argued that the credit should be the present value of gross settlement amount. Court of Appeals adopted worker’s approach. **Marron v. Industrial Commission, 176 Ariz. 515, 862 P.2d 888 (App. 1993), vacated 182 Ariz. 128, 893 P.2d 1291 (1995).** On a Petition for Review, the Supreme Court chose a third method. The insurer would receive lien credits against future benefits "when and to the extent an employee receives settlement payments." If the compensation benefits to which the worker was entitled exceeded the settlement proceeds previously collected, the deficiency must be covered by the insurer, with the lien attaching to the future settlement payments.

PRACTICE HINT: Be careful regarding distributions. If settlement proceeds are improperly disbursed by the plaintiff's attorney, workers' compensation carrier has a valid claim against both attorney and client. **State Compensation Fund v. Ireland, 174 Ariz. 490, 851 P.2d 115 (App. 1992).** [NOTE: probable bar complaint liability??]

6. **Miscellaneous**

- a. **Post judgment interest.** Workers' compensation lien applies to post judgment interest. **Young v. Industrial Commission, 146 Ariz. 582, 707 P.2d 986 (App. 1985).** However, it does not apply to interest, which has accrued on the recovery proceeds prior to disbursement. **State Compensation Fund v. Nelson, 153 Ariz. 450, 737 P.2d 1088 (1987).**
- b. **Med Pay in Auto Policy and Workers’ Compensation.** **Doneson v. Farmers Insurance 2CA-CV 2017-0174, 10/3/2018.** **An insurance policy exclusion for injuries that “require” workers’ compensation benefits applies when the injured party is entitled to such benefits, even if he must repay the benefits because of a recovery from a third-party tortfeasor.** When interpreting an insurance policy contract, a court seeks to determine intent of the parties. A court first looks to the language of the contract to determine intent and only considers extrinsic parol evidence if the contract language is reasonably susceptible to multiple, competing interpretations. An automobile insurance policy that excludes coverage when “workman’s compensation benefits are required” applies when the injured policyholder is entitled to receive worker’s compensation benefits, and there are no other reasonable interpretations of the language. Accordingly,

the court should apply the exclusion without reference to extrinsic evidence, such as whether the worker does not seek the benefits or if the worker later must repay the benefits because he recovered funds from a third-party tortfeasor.

7. No Lien Attachment to UM/UIM Benefits

a. State Farm v. Karasek, 22 Ariz. App. 86, 523 P.2d 1324 (App. 1974) employee's own Underinsured/Uninsured policy nor the employer's UM/UIM policy Sunstate Equipment Corp. v. Industrial Commission of Arizona 135 Ariz. 477, 662 P.2d 152 (App. 1983), nor to a lien on Guaranty Fund payments Martinez v. Workman's Comp. Ins. Fund, 163 Ariz. 380, 788 P.2d 113 (App. 1989). See A.R.S. § 23-661(3) under definition of "covered claim"-under this statute amounts due insurers as subrogation recoveries are expressly excluded. But see, Terry v. Auto Owners, 184 Ariz. 246, 908 P.2d 609 (App. 1995). An employer's insurance carrier providing uninsured motorist coverage to the employees was entitled to offset from uninsured motorist payments the amount of workers' compensation benefits received by an injured employee because of the explicit policy language. *Test is-if you apply endorsement, does it deprive injured party of full recovery for the loss?* Note: See policy language. See also, Cundiff v. State Farm Ins. Co., 217 Ariz. 358, 174 P.3d 270 (2008). Cundiff's UIM coverage contained a provision permitting State Farm to offset benefits Cundiff received from workers' compensation from any UIM claim she made under her policy. The court held that State Farm was entitled to offset her workers' compensation benefits against her UIM coverage "to avoid double recovery" as long as the insured was "fully compensated," relying upon Terry v. Auto Owners, supra. Supreme Court reversed Court of Appeals' decision. The Arizona Supreme Court decided the language of A.R.S. 20-259.01 precluded the liability carrier from reducing UIM coverage based on worker's receipt of workers' compensation benefits. Applied decision retroactively. Did not overrule Terry v. Auto Owners, supra. Cundiff v. State Farm Mutual Ins., supra.

b. No lien attachment to proceeds of legal malpractice action when third-party attorney has missed deadline for filing third-party case. Travelers Insurance Co. v. Breese, 138 Ariz. 508 675 P.2d 1327 (App. 1983). See also, Greer v. Travelers Property Casualty Company, 203 Ariz. 478, 56 P.3d 52 (App. 2002), when malpractice occurs after the industrial injury lien only applies to amounts expended by carrier after malpractice. Carrier sought lien as to all payments made before and after malpractice or whether these payments in fact related to benefits paid as a result of the malpractice. Court also decided that a connection to case is established if the new, separate injury occurs through treatment of the industrial injury.

c. Industrial injury aggravated by a subsequent non-industrial auto accident does not yield lien rights. Workers' Compensation carrier liable for medical care/indemnity caused by aggravation but no lien nor reassignment rights. "Did not arise from the same facts supporting the award for compensation." Lou Grubb Chevrolet, Inc. v. Argonaut Insurance Co., 174 Ariz. 23, 846 P.2d 836 (App. 1992). See A.R.S. 23-1023(D), amended 2012.

But see, Joplin v. ICA, 175 Ariz. 524, 858 P.2d 669 (App. 1993), review denied, 1993. Claimant was undergoing physical therapy for an industrial left foot injury rear-ended by another driver while on his way home from treatment. Court deemed the new, different injuries sustained in MVA compensable by industrial carrier but found he had deviated from his employment and therefore did not recover. Opinion does not address lien attachment.

In addition, the legislature in 2012 in A.R.S. § 23-1023(D) limited liens as follows:

"In a case where a lien is placed against a third party on behalf of an injured worker and the claim is for an aggravation of a previously accepted industrial injury, the lien may only apply to amounts expended for compensation and treatment of the aggravation."

d. *Lien also attaches to attorneys' fees which are "more than reasonable amount".* **State Compensation Fund v. Ireland**, *supra*. Lien does not include workers' compensation independent medical examination expenses (IME). **Rowland v. Great States Insurance**, 199 Ariz. 577, 20 P.3d 1158 (App. 2001).

PRACTICE HINT: Get lien printout and examine for independent medical examination costs, nurse consultants, and legal fees for workers' compensation defense attorney, etc.

e. *Collateral Source – Jury.* In **Warner v. Southwest Desert Images**, 218 Ariz. 121, 180 P.3d 986 (App. 2008), Court found no support in Arizona law that the collateral source rule had been abolished with respect to workers' compensation benefit payments and liens. Court prohibited plaintiff from presenting evidence of workers' compensation benefits received and the lien amount held by the workers' compensation carrier against recovery plaintiff might obtain. Absent defendant opening door, evidence of payment of workers' compensation benefits and the statutory lien inadmissible.

NOTE: Plaintiff was faced with a Rule 68, Arizona Rules of Civil Procedure (ARCP) offer of judgment less than his A.R.S. 23-1023 workers' compensation lien. No response from workers' compensation carrier regarding offer of judgment/lien reduction opened the door under **Stout** (*supra*). For a plaintiff who "requests and is refused" permission to accept an offer of judgment and later is sanctioned under Rule 68 would file such an action (bad faith) against the lien holder – use a bargaining chip – to get workers' compensation carrier's attention.

f. *Watch "Consensual Lien".* Some self-insured employers continue salary during worker's compensation case and add salary into third-party lien (e.g., City of Phoenix).

8. Reassignment of Lien (Prior to Acosta/Sierra v Kiewitt)

Old law. In the first year following injury, worker has absolute right to file suit. In year two, must secure reassignment from carrier to file suit. Can have oral assignment, but risky. Example, (Attachment #3). Watch torts with one year SOL. After the first year, the carrier may reassign the claim to the injured worker or dependents. A.R.S. § 23-1023(B); **Ducksworth v. Towmotor Corp.**, 153 Ariz. 330, 736 P.2d 813 (App. 1987). Upon reassignment, the worker has the same rights to recovery as if the suit had been filed during the first year. A.R.S. § 23-1023. Claim must be reassigned prior to the expiration of the two-year statute of limitations for personal injury actions. Reassignment by the carrier after the expiration of the statute of limitations will not be effective. See **Moore v. Toshiba**, 160 Ariz. 205, 772 P.2d 28 (App. 1989). However, see **Grim**, *infra*. The carrier has no contractual or statutory duty to reassign the claim. **Hertel v. Home Ins. Co.**, 124 Ariz. 338, 604 P.2d 269 (1979). The carrier may reassign the claim with conditions. **State v. Superior Court of Maricopa County**, 155 Ariz. 166, 745 P.2d 614 (App. 1987), **affirmed** 157 Ariz. 76, 754 P.2d 1351. Conditions may include the requirement that worker not bring a civil action against the employer, or may include condition that carrier's lien rights will not be reduced if employer is found to be partially negligent. A timely oral reassignment is valid and does not violate the statute of frauds. **Easter v. Percy**, 157 Ariz. 253, 756 P.2d 350 (1980). Affidavits by the claims adjuster attesting to the oral reassignment will be sufficient. See, pg. 3 above, 2014 discussion of **Acosta**.

Method of Reassignment

No required form for reassignment if it clearly indicates an intent to reassign the claim. **Ducksworth v. Towmotor Corp.**, *supra*. Carrier may reassign claim prospectively. **Smith v. Payne**, 156 Ariz. 506, 753 P.2d 1162 (1988). A reassignment of a claim is not retroactive to the filing of a complaint. **Dunn v. Progress Industries, Inc.**, 153 Ariz. 62, 734 P.2d 604 (App. 1986). If reassignment is not given within appropriate time limit, claimant may avoid dismissal by filing action within proper statute of limitations, and (1) moving for a substitution and joinder of the parties [Rule 17 (A), AZ Rules of Civil Procedure] and (2) requesting permission to amend complaint to add carrier as co-plaintiff [Rule

15(a), AZ Rules of Civil Procedure]. Because such a change may be retroactive to date of filing complaint, the matter may not be dismissed. **Grim v. Anheuser-Busch, Inc.**, 154 Ariz. 66, 740 P.2d 487 (App. 1987). Workers' compensation carrier must be properly joined as real party in interest; reassignment must be given before amended complaint is filed. **Moore v. Toshiba**, 160 Ariz. 205, 772 P.2d 28 (App. 1989). Can have oral reassignment, but perilous.

PRACTICE HINT: Advise carrier in writing in year one that you will forbear filing in the first year, relying on their promise to reassign in year two and get a copy of carrier's proposed written reassignment form. Reassignment can only take place in the "second year" from date of injury when carrier has the right to reassign. In the "second year", confirm written reassignment. You may have to consider filing in year one of the case if the reassignment form requires waiver of **Aitken/Dietz** pro-rata reduction in lien or restrict parties' defendant. Note in **Stout v. State Compensation Fund**, *infra*, State Compensation Fund counter claimed against plaintiff for breach of reassignment agreement when plaintiff settled without State Compensation Fund consent. See, discussion of **Stout I** and **Stout II**, *infra*, Section 4f, *infra*. Secure reassignment terms/proposed agreement before first year expires, so you can be aware of exactly the actual reassignment conditions you will be presented with after year one. **Oaks v. McQuillar**, 191 Ariz. 333, 955 P.2d 971 (App. 1998). Injured party in scope/course of employment at time of injury did not apply for workers' compensation benefits. Filed suit 18 months later against tort-feasor without requesting reassignment from his employer's workers' compensation carrier. Court of Appeals held: Plaintiff must (1) *apply* for workers' compensation benefits or *receive* them in order to require reassignment under A.R.S. §23-1023 (B). **Citing with approval, Moretto v. Samaritan Health Systems**, 190 Ariz. 343, 947 P.2d 917 (App. 1997). These cases stand for proposition that a worker injured in an industrial accident does not require a reassignment to pursue a third-party claim if the worker does not claim workers' compensation benefits. **Dugan v. Fujitsu Business Communications**, 185 Ariz. 93, 937 P.2d 706 (App. 1997) held that A.R.S. §12-502, which tolls the running of the statute of limitations when the plaintiff is of unsound mind or incompetent, applies to the one-year assignment of A.R.S. §23-1023 (B). The worker's cause of action was not assigned by operation of the statute one year after it accrued if the worker was rendered mentally incompetent by the industrial injury. The Court left open the question of how long the automatic assignment would be tolled if the worker was permanently incompetent.

9. **Balance Billing**

In workers' compensation cases, health care provider payments are controlled by the Industrial Commission Fee Schedule (available on Industrial Commission of Arizona Fee Schedule website: <http://www.ica.state.az.us>). See A.R.S. 23-908(B):

The Commission shall fix a schedule of fees to be charged by physicians, physical therapists or occupational therapists attending injured employees and, subject to subsection C of this section, for prescription medicines required to treat an injured employee under this chapter. The Commission shall annually review the schedule of fees.

Health care provider reimbursement is limited to these fees established by Industrial Commission of Arizona fee schedule. See, **Canyon Ambulatory Surgery Center of Arizona v. SCF Arizona**, 225 Ariz. 414, 239 P.3d 733 (Ct. App. 2010) Balance billing is not allowed. See Rules of Procedure before the Industrial Commission of Arizona, R20-5-117:

- A. A carrier, self-insured employer, or special fund division, shall pay bills for medical, surgical, and hospital benefits provided under A.R.S. § 23-901 et seq., according to applicable medical and surgical fee schedules adopted by the Commission and in effect at the time the services are rendered. A physician or provider of nursing, hospital, drug or other medical services shall itemize and submit a bill for payment only to the responsible carrier, self-insured employer, or special fund division (emphasis added).

- B. A claimant shall not be responsible to pay any undisputed amounts between the medical provider and the carrier, self-insured employer, or special fund division....

10. Exclusivity and Third-Party Liability

Jackson v. Eagle KMC LLC, 244 Ariz. 224, 418 P.3d 997 (App. 2018)

Synopsis: Jackson, a South Carolina resident, worked as a truck driver for “Drivers Management,” a Nebraska corporation. While traveling through Arizona, she suffered injuries in a motor vehicle accident as a result of the alleged negligence of a third party. She filed a workers’ compensation claim against Drivers Management in Nebraska. Her claim was accepted and benefits paid under Nebraska law. She then filed a lawsuit against the third party in Arizona, just before the running of the two-year statute of limitations, but without obtaining a reassignment from Drivers Management. The trial court granted the third-party’s motion for summary judgement, holding that the claim was time-barred under A.R.S. §23-1023(B). Jackson appealed, arguing that Nebraska law applied and that under Nebraska law, her lawsuit was timely.

Issue: Does A.R.S. §23-1023(B) apply to a lawsuit brought in Arizona, but involving a workers’ compensation claim filed in another state?

Holding: The judgement of the Superior Court is vacated. Nebraska subrogation law applied, and under Nebraska law, Jackson did not require a reassignment from Drivers Management to pursue the claim against the third party.

Memorable Quote: “When compensation has been paid, the law of the state of compensation should govern in third-party actions including the nature and extent of the lien subrogation, and assignment rights.” *Quoting from Quiles v. Heflin Steel Supply Co., 145 Ariz. 73, 77, 699 P.2d 1304, 1308 (App. 1985)*

The Supreme Court vacated the Court of Appeals decision. CV-18-0056-PR, January 2, 2019 and held that “We hold that Arizona’s automatic assignment provision in A.R.S. § 23-1023(B) does not apply when an employee receives workers’ compensation benefits under another state’s laws. Rather, the law of the state in which an employee’s workers’ compensation is paid determines the assignment rights of the employer and employee”

Other States-Lien Rights
California, Colorado, New Mexico, Texas, Utah

California: Labor-Code § 3852. Carrier can sue Third Party directly. WC carrier can intervene, carrier has to file and give notice, no lien on recovery of UM/UIM benefits; no subrogation against medical malpractice; unclear if subrogation rights on legal malpractice recovery; full lien recovery by WC carrier after reasonable attorney's fees and costs. If employer negligence, proportional recovery. Future credit on employee's net recovery (unless negotiated otherwise).

Colorado: Colorado Statute §-8-41-202 carrier can sue directly and can intervene even after personal injury statute of limitations expires. (2 years). No lien on UM/UIM. Lien on medical malpractice proceeds, questionable as to legal malpractice proceeds. Recovery limited to economic damage; no recovery from non-economic damages. Attorney's fees pro-rata. Has future credit (unless negotiated otherwise).

New Mexico: New Mexico Code §52-5-17. Carrier cannot sue Third Party directly. 3 year statute of limitations; Can intervene. Can get lien on recovery from UM/UIM if claiming on employer's policy; possible subrogation against medical malpractice recovery. Undecided if subrogation rights on legal malpractice. Only allows WC recovery against settlement proceeds which duplicate WC benefits paid. For example, compare WC benefits w/TORT recovery-only if duplicated do they get reimbursed. For example, pain and suffering not duplication. Must timely advise W/C of TORT proceedings; Employer fault reduces employer/WC recovery by % of fault; attorney's fees and costs are pro-rata deduction. Future credit exists (unless negotiated otherwise).

Texas: Texas Code- §417-001-417-004. Carrier can sue Third Party directly; 2 year statute of limitations; can intervene; WC recovery on UM/UIM only against employers' policy. Subrogation rights against medical and legal malpractice; carrier has just money right of recovery. Proportional reduction for employer fault. Attorney's fees and costs proportional; future credit exists if in Third Party suit carrier sues alone.

Utah: Utah Code §34-A-Z106, carrier can sue Third Party directly. 4 year statute of limitations; carrier can intervene. No WC recovery against UM/UIM benefits. Subrogation against medical malpractice; undecided against legal malpractice. Attorney's fees and costs come off top- carrier reimbursed fully, less pro-rata attorney's fees and costs. Employers fault reduces recovery if only 40% employers negligence. Full future credit (unless negotiated otherwise).

RULES OF ARIZONA INDUSTRIAL COMMISSION

R20-5-119. Notice of Third Party Settlement

- A.** Except as otherwise provided by law, if an employer is insured for workers' compensation insurance and a claimant, or in the event of death, the claimant's dependent elects to proceed against a third party, the claimant shall notify the appropriate workers' compensation carrier, or self-insured employer, of any settlement or judgment in the third party suit and the basis upon which the claimant and third party agree to disburse the proceeds of the settlement of judgment.
- B.** If an employer is uninsured for workers' compensation insurance and a claimant, or in the event of death, the claimant's dependent, elects to proceed against a third party, the claimant shall notify the special fund division of any settlement or judgment in the third party suit and the basis upon which the claimant and third party agree to disburse the proceeds of the settlement or judgment.
- C.** If a lawsuit is filed against a third party, the claimant or the claimant's attorney shall provide copies of pleadings and all offers of settlement to the workers' compensation carrier, self-insured employer, or special fund division to whom notice is required under subsections (A) and (B).

R20-5-120. Settlement Agreements, Compromises and Releases

- A.** No settlement agreement, compromise, or waiver of rights of a workers' compensation claim, will be valid unless approved by the Commission.
- B.** The acceptance of any payments or the signing of a settlement agreement, compromise, release or waiver of rights, unless approved by the Commission, shall not release the employer or his insurance carrier from any obligation imposed by the Workers' Compensation Law.
- C.** The carrier or employer shall not be entitled to a credit for any sums paid to an employee under a settlement agreement which has not been approved by the Commission.

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

Applicant, vs. Defendant Employer, *, Defendant Carrier. ICA NO.: SCF NO.: DOI:

APPROVAL OF SETTLEMENT of THIRD PARTY CLAIM; STIPULATION and CONDITIONAL RELEASE

Pursuant to A.R.S. § 23-1023(D) and Rule 19 of the Rules of Procedure before the Industrial Commission of Arizona, the APPLICANT has requested approval by SCF ARIZONA, hereinafter referred to as "SCF," of a proposed third-party settlement.

Table with financial details: GROSS SETTLEMENT, Less Attorney's Fees, Less Costs of Suit, total, AMOUNT ACTUALLY COLLECTIBLE, SCF LIEN, Indemnity, Medical benefits, Less reimbursement to SCF, AMOUNT PAYABLE TO APPLICANT, SCF CREDIT AGAINST FUTURE LIABILITY.

It is agreed that the credit against future liability of SCF shall apply to:

- checkbox credit has been waived.
checkbox all heretofore incurred but unpaid medical benefits and indemnity, if any, and to all future medical benefits and indemnity,
checkbox all heretofore incurred but unpaid medical benefits, if any, and to all future medical benefits,
checkbox all heretofore incurred by unpaid indemnity, if any, and to all future indemnity, for which SCF may become liable by virtue of a Notice of Claim Status issued by SCF, or an award of the Industrial Commission of Arizona.
checkbox Other

Contingent upon the receipt by SCF of the aforementioned reimbursement of its lien, and upon the Applicant's approval of the foregoing, SCF hereby releases the third-party defendant(s) from all liability to SCF for injuries sustained by the APPLICANT on the above-referenced date of injury.

APPROVED by SCF on SCF ARIZONA By Subrogation Specialist

APPROVED by Applicant on Applicant, or his/her Attorney

REASSIGNMENT AGREEMENT

CLAIMANT: *
DOI: *
CLAIM NO: *
EMPLOYER: *

In accordance with A.R.S. §23-1023(4), the above-captioned Applicant, hereinafter referred to as “ASSIGNEE”, and the COPPERPOINT INSURANCE COMPANY Carrier, hereinafter referred to as “ASSIGNOR”, hereby enter into a Reassignment Agreement this ___ day of ___month, 20___, based upon the following considerations and promises.

ASSIGNEE sustained an injury by accident arising out of and in the course of employment with the above-captioned Employer on or about the above-referred date of injury.

ASSIGNOR has provided medical and compensation benefits to ASSIGNEE pursuant to and defined in the Workers’ Compensation Act of Arizona.

Another person or persons (third parties), not a signatory hereto, may be responsible for the aforesaid accident.

In consideration of the mutual promise and covenants listed below, the parties undersigned agree as follows:

1. The ASSIGNOR hereby assigns to ASSIGNEE all of its interest, if any, against the person or persons responsible for ASSIGNEE’S injuries, as stated above.
2. ASSIGNEE acknowledges that ASSIGNOR has a statutory lien and credit against future liability on any recovery pursuant to A.R.S. §23-1023(D), and agrees to proceed in accordance therewith and further agrees to keep ASSIGNOR fully apprised of any matters or developments having any effect thereon.
3. ASSIGNEE agrees not to challenge ASSIGNOR’S rights to full reimbursement of its A.R.S. §23-1023(D) lien without regard to assessment of employer fault under A.R.S. §12-2506.
4. It is agreed that ASSIGNEE shall diligently and actively pursue the claim against said third parties, but shall not institute any action against the above-captioned Employer, the ASSIGNOR, and/or the stockholders, directors, officers, or the employees of either.
5. It is agreed that ASSIGNEE shall not seek judgment against any party where execution upon such judgment would cause liability to be incurred by the ASSIGNOR or the above-captioned Employer of ASSIGNEE.
6. In the event ASSIGNEE or his agent breaches any of the terms and conditions contained herein and fails to rectify said breach within five (5) days from demand made by ASSIGNOR, ASSIGNOR shall have the right to intervene or institute original proceedings and/or declare this reassignment null and void. ASSIGNOR shall be entitled to attorneys fees and expenses incurred in implementing this agreement or enforcing its terms and conditions.

APPROVED BY COPPERPOINT

APPROVED BY APPLICANT-ASSIGNEE

By: _____
Authorized Representative

By: _____
Applicant, or his/her Attorney

(Attachment #4)

Workers' Compensation Lien Checklist

<input type="checkbox"/>	1.	Call Industrial Commission of Arizona (602-542-4661) to determine if client has filed a Workers' Compensation claim. You can secure name/address of Workers' Compensation carrier.
<input type="checkbox"/>	2.	Contact Workers' Compensation carrier and determine details of claim and establish communications with Workers' Compensation adjuster.
<input type="checkbox"/>	2a.	If possible, work out lien reduction now in your case selection/evaluation process.
<input type="checkbox"/>	3.	Check to see if employer not insured for Workers' Compensation and claim is being handled by ICA "Special Fund" (602-542-4661). All comments re: carriers in checklist also apply to "Special Fund."
<input type="checkbox"/>	4.	Send notice of third-party representation to Workers' Compensation carrier. [Required by Industrial Commission Rule and Statute A.R.S. § 23-1023 (as amended 9-19-07)]
<input type="checkbox"/>	4a.	Send Intent to Sue ASAP (required by A.R.S. 23-1023 (amended 9/19/07).
<input type="checkbox"/>	4b.	Contact carrier soon and establish contact name etc. Before settlement re-contact Workers' Compensation carrier and determine if lien and exact amount. [Required by Industrial Commission Rule (see Attachment #1 herein)].
<input type="checkbox"/>	5.	Update Workers' Compensation carrier with Complaint filing. [Required by Industrial Commission Rule and A.R.S. 23-1023 (amended 9/19/07)].
<input type="checkbox"/>	5a.	Also send pleadings and rules (required by A.R.S. 23-1023 (amended 9/19/07).
<input type="checkbox"/>	6.	Update Workers' Compensation carrier periodically with disclosure documents, especially defense documents which discuss liability and damages. (Also see 5a above continuing duty)
<input type="checkbox"/>	7.	Ensure all health care providers' bills and records substantiating same are sent to Workers' Compensation carrier for payment under ICA Fee Schedule-lien is based on fee schedule. Go to Industrial

		Commission Fee Schedule on internet at www.ica.state.az.us .
[]	8.	Familiarize self with A.R.S. 23-1023 and R-20-5-119 and 120, Rules of Procedure Before ICA. (See 5&6 above)
[]	9.	Get reassignment (if suit not filed in one year). [See Attachment #3 herein]. <u>See discussion on pages 2 and 3 material re: Acosta/Sierra.</u>
[]	10.	On reassignment request, start early (well before one-year of date of accident). <u>See discussion on pages 2 and 3 material re: Acosta/Sierra.</u>
[]	11.	Ask to review reassignment documents to ensure favorable terms <u>or file suit before one year</u> . (Watch torts with a one year SOL) <u>See discussion on pages 2 and 3 material re: Acosta/Sierra.</u>
[]	12.	During first year from date of accident, write Workers' Compensation carrier that you will forebear filing suit if they will give reassignment; confirm promise to reassign in writing before 1 year statute of limitations. [See Attachment #3 herein]. <u>See discussion on pages 2 and 3 material re: Acosta/Sierra. But see, depublished opinion.</u>
[]	13a.	After first year of accident and only then can Workers' Compensation carrier give reassignment form in advance. Examine terms. Secure dated and executed reassignment form after the first year. Can have oral reassignment, but better to have in document. <u>See discussion on page 3 material re: Acosta/Sierra.</u>
[]	13b.	Watch newly amended A.R.S. 23-1023 (9/19/07). Workers' compensation carrier can file if one-year statute of limitations.
[]	13c.	Carrier can intervene!! (See Amended A.R.S. § 23-1023B(3) (9-19-07).
[]	14.	Do not allow client to sign "Lien Letter" or "Letter of Protection" agreeing to pay health provider more than Industrial Commission of Arizona Fee Schedule (Consensual Lien??)
[]	15.	Periodically request lien amount from Workers' Compensation carrier... ask for split out as to indemnity and medical benefits and permanent benefits, in writing. WATCH : "Consensual Lien".

[]	16.	Inquire if any settlements were made in Workers' Compensation case and secure details / documents. [Not in lien unless <u>specifically added in</u> to lien in workers' compensation settlement agreement]
[]	17.	Review all claimed lien amounts regarding propriety, i.e. no legal expenses; no Defense medical exam costs, nurse consultants' expenses, etc.
[]	18.	Prior to third party settlement conference / mediation ... especially provide defense disclosure or settlement memo to Workers' Compensation adjuster (particularly, if you want to ask for lien reduction).
[]	19.	Explain to third party client – Workers' Compensation case has future credit on all <u>net</u> proceeds of client if settlement achieved (unless negotiated otherwise). Document to client. [See Attachments #2 herein].
[]	20.	Do not write pro/con letter regarding good/bad parts of case to Workers' Compensation adjuster – (discoverable?). (Send defense pleadings instead).
[]	21.	Check with Workers' Compensation carrier prior to settlement and confirm exact lien amount prior to actual settlement. Secure in writing.
[]	22.	Ask for approval to settle/compromise at <u>specific</u> amount. <u>Confirm in writing.</u>
[]	23.	Negotiate settlement on pro-rata reduction of lien due to employee / employer fault, as well as strengths and weaknesses in case.
[]	23a.	Be NICE.
[]	23b.	If not successful in pretrial settlement, then try case and ask for equitable apportionment under <u>Twin City v. Leija</u> (See 3.c. infra).
[]	24.	Secure reduction in lien by providing actual costs incurred in litigation.

<input type="checkbox"/>	25. 25a. 25b.	Confirm future credits or waiver of same in writing. Ask for future credits to be totally waived or at least to exclude credit on future medical care in Workers' Compensation case. [See Attachments #2 herein]. Post-closure expenses, "lien add-in" – watch – agree to finality with adjuster. Do not need later-appearing, large medical bills added to lien. Find out position of workers' compensation carrier on liens, lien reduction <u>before</u> trial or mediation, or arbitration. Try to set up sliding scale.
<input type="checkbox"/>	26.	Offer to reduce third party attorney fee if concomitant reduction in Workers' Compensation lien or future credits.
<input type="checkbox"/>	27.	Remember: no Workers' Compensation lien on Uninsured/UM or Underinsured/UIM motorists' benefits. No offset on underinsured motorist/uninsured motorist benefits from workers' compensation benefits. (See, p.9 in text of material, para. 6b. for case law citation).
<input type="checkbox"/>	28.	Explain terms of settlement and integration into workers' compensation case and future credits in Workers' Compensation case to third party plaintiff. Have client sign off on disbursement approval and acknowledge receipt of copy. Acknowledge advice about credit reduction (See 30 below). (See Model Calculation, Attachment 5, herein).
<input type="checkbox"/>	29.	File all third party settlements which include Workers' Compensation terms/credits with Industrial Commission of Arizona and Workers' Compensation carrier.
<input type="checkbox"/>	30.	If future credit. Advice client to save all medical bills, records, and amounts paid to periodically submit to workers' compensation carrier to reduce credit, if practical.
<input type="checkbox"/>	31.	Thank adjuster for cooperation (as you may deal with him/her again).

(Attachment #5)

**MODEL CALCULATION OF DISBURSAL
AND SETTLEMENT OF FUTURE CREDITS**

Personal Injury Settlement Amount	\$150,000.00
Attorney's Fees and Costs	<u>(\$ 50,000.00)</u>
Net	\$100,000.00
Worker's Compensation Lien at date of Settlement (and they won't negotiate/reduce)	<u>(\$ 50,000.00)</u>
Net to Client	\$50,000.00*

* Future Credit [if not compromised as to amount or application; e.g., only applies to future dollar compensation – not medical costs or some proportions, etc.]. Applies to **all** future workers' compensation indemnity and all medical expenses. (See pgs. 4-5, para. b, *infra*; **EBI, Inc. v. ICA**, 178 Ariz. 624, 875 P.2d 857 (App. 1994). See **Hobson v. Mid Century Ins. Co.**, 199 Ariz. 525, 19 P.3d 1'241 (App. 2011), Petition for Review denied, October 3, 2011. For excellent discussion of worker's compensation lien law and method of calculating same and net to client, see p. 8, para. C, *infra*.