

Third -Party Liens

THE GOOD, THE BAD, & THE HOLIDAY!

Presenters

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Rhode Island General Law

§28-35-58. Liability of third persons for damages.

(a) Where the injury for which compensation is payable under chapters 29 – 38 of this title was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect of the injury, the employee may take proceedings, both against that person to recover damages and against any person liable to pay compensation under those chapters for that compensation, and the employee shall be entitled to receive both damages and compensation. The employee, in recovering damages either by judgment or settlement from the person so liable to pay damages, shall reimburse the person by whom the compensation was paid to the extent of the compensation paid as of the date of the judgment or settlement and the receipt of those damages by the employee shall not bar future compensation. An insurer shall be entitled to suspend the payment of compensation benefits payable to the employee when the damages recovered by judgment or settlement from the person so liable to pay damages exceeds the compensation paid as of the date of the judgment or settlement. The suspension paid shall be the number of weeks that are equal to the excess damages paid divided by the employee's weekly compensation rate; however, during the period of suspension the employee shall be entitled to receive the benefit of all medical and hospital payments on his or her behalf. If the employee has been paid compensation under those chapters, the person by whom the compensation was paid shall be entitled to indemnity from the person liable to pay damages, and to the extent of that indemnity shall be subrogated to the rights of the employee to recover those damages. When money has been recovered either by judgment or by settlement by an employee from the person liable to pay damages, by suit or settlement, and the employee is required to reimburse the person by whom the compensation was paid, the employee or his or her attorney shall be entitled to withhold from the amount to be reimbursed that proportion of the costs, witness expenses, and other out-of-pocket expenses and attorney fees which the amount which the employee is required to reimburse the person by whom compensation was paid bears to the amount recovered from the third party.

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- Recovery of damages from 3rd party responsible for injury does not bar EE from entitlement to workers' compensation benefits.
 - EE, in recovering damages either by judgment or settlement from person so liable to pay damages, shall reimburse the person by whom compensation was paid, to the extent of the compensation paid as of the date of judgment or settlement.

§28-35-58

Breakdown

§28-35-58 Breakdown

- Insurer is entitled to suspend payment of compensation (with exception of medical and hospital payments) payable to the EE when damages recovered exceeds the compensation paid. Suspension shall be the number of weeks that are equal to the excess damages divided by the weekly compensation rate.
- When money has been recovered by the EE and the EE is required to reimburse the person by whom compensation was paid, the EE and his Attorney shall be entitled to withhold from the amount reimbursed that proportion of costs, witness fees and other out of pocket expenses and attorneys' fees which the amount which the EE is required to reimburse bears to the amount recovered.

Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee shall be entitled, without election, to the compensation and other benefits provided under this chapter. Either the employee or insurer may proceed to enforce the liability of such person, but the insurer may not do so unless compensation has been paid in accordance with sections seven, eight, ten A, eleven C, twelve or nineteen nor until seven months following the date of such injury. The sum recovered shall be for the benefit of the insurer, unless such sum is greater than that paid by it to the employee, in which event the excess shall be retained by or paid to the employee. For the purposes of this section, "excess" shall mean the amount by which the gross sum received in payment for the injury exceeds the compensation paid under this chapter. The party which brings the actions or which pays the costs associated with the action, if the party bringing the action does not pay those costs, shall be entitled to retain those costs recovered in the action. Any interest received in such action shall be apportioned between the insurer and the employee in proportion to the amounts received by them respectively, exclusive of interest and costs. The expenses of attorney's fees shall be divided between the insurer and the employee in proportion to the amounts received by them respectively, under this section. Except in the case of settlement by agreement by the parties to, and during a trial of, such an action at law, no settlement by agreement shall be made with such other person without the approval of either the board, the reviewing board, or the court in which the action has been commenced after a hearing in which both the employee and the insurer have had an opportunity to be heard. At such hearing the court shall inquire and make a finding as to the taking of evidence on the merits of the settlement, on the fair allocation of amounts payable to the employee and the employee's spouse, children, parents and any other member of the employee's family or next of kin who may have claims arising from the injury for which are payable, under this chapter in which the action has been commenced after an opportunity has been afforded both the insurer and the employee to be heard on the merits of the settlement and on the amount, if any, to which the insurer is entitled out of such settlement by way of reimbursement, and on the amount of excess that shall be subject to offset against any future payment of benefits under this chapter by the insurer, which amount shall be determined at the time of such approval. In determining the amount of "excess" that shall be subject to offset against any future compensation payment the board, the reviewing board, or the court in which the action has been commenced shall consider the fair allocation of amounts payable to and amongst family members who may have claims arising from the injury for which said compensation is payable. In the case of a settlement by agreement by the parties to and during a trial of such an action at law, only the justice presiding at the trial shall have and exercise, relative to the approval of such settlement by agreement and to the protection of the rights and interests of the employee, his family members, and the insurer, the powers granted in the preceding sentence. Nothing in this section, or in section eighteen or twenty-four shall be construed to bar an action at law for damages for personal injuries or wrongful death by an employee against any person other than the insured person employing such employee and liable for payment of the compensation provided by this chapter for the employee's personal injury or wrongful death and said insured person's employees. For purposes of this section, the Workers' Compensation Trust Fund, as established under subsection (2) of section sixty-five, shall be deemed an insurer.

Massachusetts Chapter 152 §15. Liability of person other than insured

Chapter 152 §15 Breakdown

- Recovery of damages from third-party responsible for injury does not bar employee from entitlement to workers' compensation benefits.
- Sum recovered is for benefit of the insurer with "excess" being returned to employee.
- Expenses and counsel fee shall be shared in proportion to amount recovered.

Chapter 152 §15 Breakdown

- Any settlement must be reviewed by board or court in which action commenced after hearing on which both employee and insurer have an opportunity to be heard.
- Reviewed for fair allocation of amounts payable to employee, spouse, children, next of kin, the amount to which insurer is entitled to out of settlement and the amount of excess that shall be subject to future offset.

Code of Virginia

§65.2-309. Lien against settlement proceeds or verdict in third party suit; subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.

A. A claim against an employer under this title for injury, occupational disease, or death benefits shall create a lien on behalf of the employer against any verdict or settlement arising from any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury, occupational disease, or death, and such employer also shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.

B. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or the benefit of the injured employee, his personal representative, or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in [§ 65.2-311](#)

C. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Commission and the injured employee or the personal representative or dependents of the deceased employee being first obtained.

D. If an injured employee, his personal representative, or a person acting on behalf of the injured employee receives the proceeds of the settlement or verdict and the employer's lien pursuant to subsection A has not been satisfied, the employer shall have the right to recover its lien either as a credit against future benefits or through a civil action against the person who received the proceeds.

E. Any arbitration held by the employer in the exercise of such right of subrogation (i) shall be limited solely to arbitrating the amount and validity of the employer's lien, (ii) shall not affect the employee's rights in any way, and (iii) shall not be held unless:

1. Prior to the commencement of such arbitration the employer has provided the injured employee and his attorney, if any, with a written itemization of the expenses associated with the lien that is the subject of the arbitration;
2. Upon receipt of the itemization of the lien, the employee shall have 21 days to provide a written objection to any expense included in the lien to the employer, and if the employee does not do so any objections to the lien to be arbitrated shall be deemed waived;
3. The employer shall have 14 days after receipt of the written objection to notify the employee of any contested expenses that are included in the lien to the employer, and if the employer does not do so any itemized expense objected to by the employee shall be deemed withdrawn and not included in the arbitration; and
4. Any contested expenses remaining shall have been submitted to the Commission for a determination of their validity and the Commission has made such determination of validity prior to the commencement of the arbitration.

half of the employer against any verdict or settlement arising from any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury, occupational disease, or death, and such employer also shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.

for which he is liable shall be held by the employer for the benefit of the injured employee, his personal representative, or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in [§ 65.2-311](#)

of the Commission and the injured employee or the personal representative or dependents of the deceased employee being first obtained.

proceeds of the settlement or verdict and the employer's lien pursuant to subsection A has not been satisfied, the employer shall have the right to recover its lien either as a credit against future benefits or through a civil action against the person who received the proceeds.

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1. Prior to the commencement of such arbitration the employer has provided the injured employee and his attorney, if any, with a written itemization of the expenses associated with the lien that is the subject of the arbitration;
2. Upon receipt of the itemization of the lien, the employee shall have 21 days to provide a written objection to any expense included in the lien to the employer, and if the employee does not do so any objections to the lien to be arbitrated shall be deemed waived;
3. The employer shall have 14 days after receipt of the written objection to notify the employee of any contested expenses that are included in the lien to the employer, and if the employer does not do so any itemized expense objected to by the employee shall be deemed withdrawn and not included in the arbitration; and
4. Any contested expenses remaining shall have been submitted to the Commission for a determination of their validity and the Commission has made such determination of validity prior to the commencement of the arbitration.

Code of Virginia

§65.2-310. Protection of employer when employee sues third party.

In any action by an employee, his personal representative or other person against any person other than the employer, the court shall, after reasonable notice to the parties and the employer, ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses incurred by the employer under the provisions of this title and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in § [65.2-311](#); and, in event of judgment against such person other than the employer, the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

Code of Virginia

65.2-311. Expenses and attorney's fees in action under §65.2-309 or §65.2-310.

A. Except as provided in subsection B, in any action, or claim for damages, by an employee, his personal representative or other person against any person other than the employer, and in any such action brought, or claim asserted, by the employer under his right of subrogation provided for in § [65.2-309](#), if a recovery is effected, either by judgment or voluntary settlement, the reasonable expenses and reasonable attorney's fees of such claimants shall be apportioned pro rata between the employer and the employee, his personal representative or other person, as their respective interests may appear.

B. If the employer is required to institute an action against any party to recover some or all of its lien pursuant to subsection D of § [65.2-309](#), the employer shall not be required to pay any share of the reasonable expenses and reasonable attorney's fees associated with that portion of its lien that is not preserved by the employee, his personal representative or other person.

Code of Virginia

§65.2-313. Method of determining employer's offset in event of recovery under §65.2-309 or §65.2-310.

In any action or claim for damages by an employee, his personal representative or other person against any person other than the employer under § [65.2-310](#), or in any action brought, or claim asserted, by the employer under his right of subrogation provided for in § [65.2-309](#), if a recovery is effected, the employer shall pay to the employee a percentage of each further entitlement as it is submitted equal to the ratio the total attorney's fees and costs bear to the total third-party recovery until such time as the accrued post-recovery entitlement equals that sum which is the difference between the gross recovery and the employer's compensation lien. In ordering payments under this section, the Commission shall take into account any apportionment made pursuant to § [65.2-311](#).

For the purposes of this section, "entitlement" means compensation and expenses for medical, surgical and hospital attention and funeral expenses to which the claimant is entitled under the provisions of this title, which entitlements are related to the injury for which the third-party recovery was effected.

Hypothetical

1

Employee/plaintiff settles third party liability case for \$100,000. There is no loss of consortium claim, but there is a claim for pain and suffering. At the time of the settlement, there is a workers' compensation lien of \$30,000. The employee is receiving weekly compensation checks at the time of settlement.

Employee/plaintiff settles third party liability case for \$100,000. This amount is the limit of the tortfeasor's insurance policy. There is no loss of consortium claim, but there is a claim for pain and suffering. At the time of settlement, there is a workers' compensation lien of \$500,000. The employee is receiving weekly compensation checks at the time of the settlement.

Hypothetical

2

Hypothetical #3

Employee/ plaintiff and his family settle a third-party liability case for \$4,000,000. This amount is the limit of the tortfeasor's insurance policy. As a result of the injuries sustained, the employee is a quadriplegic. The employee has a spouse and a minor child, each has a claim for loss of consortium. At the time of settlement, there is a workers' compensation lien of \$500,000. The employee is receiving weekly checks for total compensation at the time of settlement.

Case Law

- Vellucci v. Miller, 989 F. Supp.2d 211 (R.I. 2013).
- Jennings v. Nationwide Ins. Co., 669 A.2d 534 (R.I. 1996).
- Hinger v. W.A.N.P., LLC., No. PC-2013-0421, 2018 WL 1188920 (R.I. 2018).
- Rison v. Air Filter Sys., Inc., 707 A.2d 675 (R.I. 1998).
- Eisner v. Hertz Corp., 407 N.E.2d 1286 (Mass. 1980).
- Curry v. Great Am. Ins. Co., 954 N.E.2d 580 (Mass. App. Ct. 2011).
- Stowers v. Ga. Pac., LLC., No. VA00001039275, (VA WCC 2018).
- Stowers v. Ga. Pac., LLC., No. VA00001039275 (VA WCC 2021).
- Stowers v. Ga. Pac., LLC., No. 0333-21-3, 2022 WL 903486 (Va. Ct. App. 2022).