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The relationship between workers' compensation claims and negligence lawsuits against potentially responsible third parties is governed by section 29 of the Workers' Compensation Law.¹

¹ Issues related to the subject addressed in this article were previously considered in David Grey, Settlement of a Third-Party Action With a Related Workers' Compensation Claim, 6 J. SUFF. ACAD. L. 51 (1989).

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1. N.Y. WORK. COMP. LAW §§ 29(1) and 29(4) (McKinney 1993). The statute states in pertinent part:

(1) If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues...

(4) If such injured employee, or in case of death, his dependents, proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case.
The purpose of section 29 is to permit the injured worker to pursue his claim for workers' compensation benefits, while simultaneously maintaining a personal injury action against a third party. Under most circumstances, the compensation carrier maintains both a lien for benefits paid and a credit for future payments against the worker's net third-party recovery. It must, however, bear its equitable share of the expenses associated with obtaining the third-party recovery.

The law regarding compensation liens and the extent to which they may be recoverable by the compensation carrier has undergone continuous evolution since 1978, including, but not limited to, the effects of the Court of Appeals decision in Matter of Kelly v. State Insurance Fund. This article is principally concerned with the recent decisions involving the relationship between section 29 and the No-Fault law. Several of the cases discussed herein are pending on appeal and may radically alter the present practice and procedure regarding compensation liens.

I. AN INTRODUCTION TO SECTION 29

Section 29(1) provides that where "an employee entitled to compensation... be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation... or to pursue his remedy against such other but may" do both. This provision must be read in conjunction with section 11 of the Workers' Compensation Law, which provides

Id.

2. N.Y. WORK. COMP. LAW §§ 29(1) and 29(4) (McKinney 1993).
3. N.Y. WORK. COMP. LAW §§ 29(1) and 29(4) (McKinney 1993); see Clark v. Oates & Burger Co., 16 A.D.2d 490, 229 N.Y.S.2d 513 (3d Dep't 1962) (holding that workman's compensation claimant did not forfeit his right to possible deficiency compensation by agreeing without consent of compensation carrier during pendency of an appeal of a third-party action by his adversary to accept an amount as full payment that was less than judgment awarded to him).
4. N.Y. WORK. COMP. LAW §§ 29(1) and 29(4) (McKinney 1993).
that in case of the injury or death of an employee other than as a result of the willful and malicious conduct of the employer, 
"[t]he liability of an employer...[for payment of compensation]...shall be exclusive and in place of any other liability whatsoever...." The employee is therefore limited to a workers' compensation remedy against his employer, and the possibility of a negligence action — with its associated recovery for hedonic damages, not obtainable in workers' compensation — lies only against a third party to the employment relationship.

7. N.Y. WORK. COMP. LAW § 11 (McKinney 1992). The statute states:
The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, spouse, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case of his death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. The liability under this chapter of The New York Jockey Injury Compensation Fund, Inc. created under section two hundred thirteen of the racing, pari-mutuel wagering and breeding law shall be limited to the provision of workers' compensation coverage, and any statutory penalties resulting from the failure to provide such coverage.

_Id.; see Maines v. Cronomer Val. Fire Dep't, 50 N.Y.2d 535, 541, 407 N.E.2d 466, 469, 429 N.Y.S.2d 622, 624 (1978) (finding that plaintiff's action was not barred due to a section of the Volunteer Fireman's Benefit Law governing exclusiveness of remedy and a section of the Workers' Compensation Law governing subrogation of remedies of employees); LeFever v. Stultz, 93 A.D.2d 794, 461 N.Y.S.2d 832 (1st Dep't 1978). The court found that a triable issue of fact existed as to whether Workers' Compensation Law was applicable where an employee was injured in an attempt to sober up a fellow employee when he returned from lunch intoxicated. _Id._ at 795, 461 N.Y.S.2d at 834.
II. THE EVOLUTION OF SECTION 29(1-A)

Prior to 1978, all third-party actions brought by injured workers for personal injuries or death were subject to the lien rights of the compensation carrier. In motor vehicle accidents, this created two classes of victims. Those injured outside the scope of their employment could receive No-Fault benefits and pursue a personal injury action upon which no lien existed. Those injured while in the course of their employment received workers' compensation benefits rather than No-Fault benefits. Unlike the No-Fault carrier, however, the compensation carrier could assert a lien against any third-party recovery. The result was that a compensation claimant became a self-insurer for at least part of his "basic economic loss," a result not intended when the No-Fault law was enacted.

The concerted action of the Legislature and the judiciary has since eroded both the types of actions which are governed by section 29 and the extent to which the carrier's lien rights are enforceable. In 1978, the Legislature amended the Workers' Compensation Law and added section 29(1-a) which provides that the compensation carrier "liable for the payment of . . . compensation and/or medical benefits shall not have a lien on the proceeds of any recovery received pursuant to" the No-Fault law. In 1981, section 29(1-a) was interpreted by the

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10. N.Y. WORK. COMP. LAW § 29(1-a) (McKinney 1993). The statute states:

1-a. Notwithstanding any other provision of this chapter, the state insurance fund, if compensation and/or medical benefits be payable therefrom, or otherwise the person, association, corporation, insurance carrier or statutory fund liable for the payment of such compensation and/or medical benefits shall not have a lien on the proceeds of any recovery received pursuant to subsection (a) of section five thousand one hundred four of the insurance law, whether by judgment, settlement or
Appellate Division, First Department, as depriving the carrier's of its lien only to the extent that its payments were equivalent to basic economic loss. 11

Two years later, in Fellner v. Country Wide Ins., 12 the Appellate Division, Third Department, held that under section 29(1-a) the carrier had neither a lien nor a credit for payments of compensation equivalent to basic economic loss, which was further defined to mean payments for lost earnings within three years of the accident or a combination of lost earnings and medical expenses within $50,000. 13 The Fellner court further held that the compensation carrier was not deprived of a lien or a credit for payments made in excess of basic economic loss. 14

The distinction between the types of payments which make up a compensation lien and the types of recoveries to which the lien attaches was addressed in Simmons v. St. Lawrence County CDP, Inc. 15 In Simmons, the plaintiff argued that the portion of the third-party recovery attributable to pain and suffering was subject to neither a compensation lien nor to a credit under section 29(4) because such recovery was not equivalent to payment of compensation for lost wages or medical expenses beyond three years or $50,000. This argument was rejected based on the plain language of section 29, which grants the compensation carrier a lien and a credit on "any recovery" for personal injury or death,

otherwise for compensation and/or medical benefits paid which were in lieu of first party benefits which another insurer would have otherwise been obligated to pay under article fifty-one of the insurance law. The sole remedy of any of the foregoing providers to recover the payments specified in the preceding sentence shall be pursuant to the settlement procedures contained in section five thousand one hundred five of the insurance law.

Id.

12. 95 A.D.2d 106, 466 N.Y.S.2d 766 (3d Dep't 1983)(stating that a compensation carrier shall not have a lien for compensation and/or medical benefits paid which were in lieu of first-party benefits).
13. Id. at 110, 466 N.Y.S.2d at 769.
14. 95 A.D.2d at 106, 466 N.Y.S.2d at 766.
15. 147 A.D.2d 323, 543 N.Y.S.2d 185 (3d Dep't 1989).
irrespective of a characterization of the third-party recovery as constituting payment for pain and suffering. 16

The *Simmons* holding that payment of compensation benefits in excess of basic economic loss would always create a lien (in addition to a credit) against any third-party recovery was reiterated in the 1990 decision of *Layman v. County of Rockland*, 17 wherein the court declared "that [the compensation carrier's] lien attaches to any workers' compensation benefits paid to plaintiff . . . which are not in lieu of first-party benefits and is enforceable against a third-party recovery for pain and suffering." 18

III. THE EXPANSION OF SECTION 29(1-A)

Although section 29(1-a) began to restrict the absolute right of a compensation carrier to a lien, the Third Department decisions in *Fellner* and *Simmons* defeated the efforts of injured workers to further limit carriers' lien rights. Not only did the compensation carrier retain a lien and a credit for any payments not "in lieu of first-party benefits," but such could be asserted against any third-party recovery, even one which did not duplicate payments recoverable under the Workers' Compensation law. In 1990, the Court of Appeals decided *Dietrick v. Kemper Ins. Co.*, 19 in

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16. *Id.* at 326, 543 N.Y.S.2d at 187. *See also* N.Y. WORK. COMP. LAW § 29(1) (McKinney 1993). The statute states in relevant part:
In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees. . . .

*Id.*

17. 162 A.D.2d 814, 557 N.Y.S.2d 723 (3d Dep't 1990) (holding that defendant's lien attaches to any workers' compensation benefits paid to plaintiff which are not in lieu of first-party benefits).

18. *Id.* at 815, 557 N.Y.S.2d at 724.

19. 76 N.Y.2d 248, 250, 556 N.E.2d 1108, 1109, 557 N.Y.S.2d 301, 302 (1990) (declaring that defendant has a valid lien to the full extent of the
which it interpreted section 29(1-a) to enable the injured worker to retain a larger portion of the third-party recovery. Prior to
Dietrick, compensation carriers asserted liens against third-party
recoveries for payments made pursuant to section 15(3) of the
Workers’ Compensation Law, even where such payments did
not exceed the three year or $50,000 limitation set forth in
Fellner. Liens were asserted on the basis that awards of
compensation for “permanent” disability, even if made within
three years or $50,000, were not equivalent to basic economic
loss under the No-Fault law, and accordingly, did not fall within
the purview of section 29(1-a).

The Dietrick court, noting that “the central thrust of the
Workers’ Compensation Law is to reimburse an employee for
lost wages,” held that because “loss of earnings or earning
capacity underlie all types of workers’ compensation awards,” no
payment of compensation within three years or $50,000 could
be asserted as a lien upon a third-party recovery, even though
such payment was characterized within the workers’
compensation system as an award for “permanent” injury.

settlement proceeds subject to an apportionment of reasonable and necessary
expenditures including attorney’s fees incurred in effecting the settlement).
20. N.Y. WORK. COMP. LAW § 15(3) (McKinney 1993). The statute
concerns awards for permanent injuries to limbs, vision, or hearing.
Oneida Co. 1983)(holding that the state insurance fund was not entitled to a
lien under §29(1-a) for payments it made for plaintiff’s medical expenses and
loss of earnings but was entitled to a lien for the payments for plaintiff’s partial
disability and facial disfigurement).
22. 76 N.Y.2d 248, 252, 556 N.E.2d 1108, 1110, 557 N.Y.S.2d 301, 303
(1990). The court held that workers’ compensation awards for permanent
partial disability are necessary, because such awards are directly related to
plaintiff’s basic economic loss, i.e., lost earnings, whether actual or presumed.
Id. at 252, 556 N.E.2d at 1110, 557 N.Y.S.2d at 303.
23. Id. at 253-254, 556 N.E.2d at 1111, 557 N.Y.S.2d at 304, according
to Insurance Law § 5104(a), since workers’ compensation payments are
directly related to the employee’s basic economic loss, i.e., lost earnings,
whether actual or presumed, (Insurance Law § 5102(a)(2) and (b)) are
therefore deemed to be “in lieu of first party benefits” the employee would
have otherwise been entitled to receive. Id.
As a result of section 29(1-a) and the ruling in Dietrick, many third-party actions arising out of motor vehicle accidents can be resolved without reimbursement of a compensation lien. This has occasionally resulted in a failure by plaintiff’s counsel to obtain the consent of the workers’ compensation carrier to such settlement as required by section 29(5). It is essential to note that both before and after the Dietrick decision, even in the absence of a present compensation lien, the compensation carrier may retain a credit against the injured worker’s net third-party recovery. This credit can be applied against the carrier’s subsequent liability for payment of compensation benefits in excess of basic economic loss as defined in Dietrick. Because many of the injured worker’s rights under the Workers’ Compensation Law are ongoing in nature and may continue for life, failure to obtain the compensation carrier’s consent, even in the absence of a present lien, may serve to defeat any future entitlement to benefits and may render the practitioner subject to a potential malpractice action.

IV. JOHNSON V. BUFFALO & ERIE COUNTY PRIVATE INDUS. COUNCIL

In Johnson v. Buffalo & Erie County Private Indus. Council, the plaintiff was injured in a motor vehicle accident during the course of his employment. After filing for and receiving workers’ compensation benefits, he settled his third-party lawsuit without the consent of the compensation carrier for the policy limit of $10,000. One year later, he was classified by the Workers’ Compensation Board as having a permanent partial disability.

25. 76 N.Y.2d at 253, 556 N.E.2d at 1111, 557 N.Y.S.2d at 304.
28. Id. at 764, 596 N.Y.S.2d at 187.
entitling him to ongoing weekly payments. Pursuant to Dietrick, the compensation carrier continued to pay for another eighteen months, at which point it suspended payments on the grounds that its payments now exceeded $50,000 and it was relieved of all further liability by reason of the plaintiff's failure to obtain its consent to the third-party settlement.29 The Workers' Compensation Board found that the carrier was entitled to suspend payments based on the lack of consent by the carrier to the third-party settlement. The Board distinguished Dietrick by finding that payments made beyond three years or $50,000 were not equivalent to basic economic loss.

On appeal, the Appellate Division, Third Department "fail[ed] to find a distinction between the lump-sum permanent partial disability award in Dietrick and the continuing permanent partial disability award paid weekly in the instant matter."30 The court reasoned that "[b]oth awards, by their nature, extend beyond the three-year period for lost wages set by" the No-Fault law.31 Accordingly, since the carrier has neither a lien against nor a credit for the recovery obtained in the third-party action, it has no right to consent to the settlement. Therefore, the decision of the Workers' Compensation Board was reversed.

After Johnson, which is presently pending before the Court of Appeals, it appears that the compensation carrier may have neither a lien, nor credit, nor right to consent to the settlement of any third-party action arising out of a motor vehicle accident covered under the No-Fault law.

29. Id. Had the compensation carrier consented, it could have suspended payments at that point, in any event, as it would have had the right to a credit under § 29(5) for the plaintiff's net recovery. Id.; Under those circumstances, the injured worker would have been temporarily ineligible for compensation benefits, whereas the failure to obtain consent relieved the carrier of responsibility in perpetuity. Id.; see Merrill v. Moultrie, 166 A.D.2d 392, 392, 561 N.Y.S.2d 562, 563 (1st Dep't 1990) (stating that a claimant settling a third party action must either obtain written approval of the settlement from the compensation carrier or seek a compromise order from the court in order to preserve his rights to collect workers' compensation).


31. Id.
It was previously noted that two classes of motor vehicle accident victims existed prior to the enactment of section 29(1-a), and those who were injured while in the course of their employment had rights inferior to those who were not. The appellate division in *Johnson* seems to have created two classes of workers' compensation claimants. Those injured on the job, other than in a motor vehicle accident, are required to obtain the consent of the compensation carrier prior to the settlement of their third-party lawsuit.\textsuperscript{32} Failure to obtain such consent will result in the termination of any further rights to compensation benefits, even after the carrier's credit against the net third-party recovery has been exhausted.\textsuperscript{33} However, if consent is obtained as required, the carrier may assert a lien against the third-party recovery for all benefits paid.\textsuperscript{34} In addition, the carrier has a credit for future payments of compensation against the full amount of the injured worker's net third-party recovery.\textsuperscript{35} Therefore, the only limitation on the carrier's rights is its obligation to pay a proportionate share of the legal fees and litigation costs expended in obtaining the third-party recovery.\textsuperscript{36}


\textsuperscript{33} Johnson, 192 A.D.2d at 764, 596 N.Y.S.2d at 187; see also David Grey, *supra* note 9, at 51.


\textsuperscript{35} See Petterson v. Daystrom Corp., 17 N.Y.2d 32, 40, 215 N.E.2d 329, 332, 268 N.Y.S.2d 1, 6 (1966)(carrier is entitled to credit for net proceeds received out of settlement of the action).

Conversely, under the *Johnson* decision, those injured in vehicular accidents while in the course of their employment may pursue third-party actions free of any obligation to the workers’ compensation carrier, and may reap the benefit of the entire recovery without diminution.

The *Johnson* court’s interpretation of *Dietrick* potentially creates a fundamental unfairness by granting some workers’ compensation claimants greater rights than others based solely on the mechanism by which they were injured. Hopefully, the Court of Appeals will grant leave, and decide whether the *Johnson* court erred in failing “to find a distinction between the lump-sum permanent partial disability award in *Dietrick* and the continuing permanent partial disability award paid weekly.”

Section 5102(a) of the Insurance Law defines “basic economic loss” as loss of earnings, medical expenses, and other reasonable and necessary expenses resulting from a motor vehicle accident, up to a total of $50,000. “Basic economic loss” of earnings is


38. N.Y. INS. LAW § 5102(a) (1) (McKinney 1994). The statute states:
   (a) “Basic economic loss” means, up to fifty thousand dollars per person of the following combined items, subject to the limitations of section five thousand one hundred eight of this article: (1) All necessary expenses incurred for: (i) Medical, hospital (including services rendered in compliance with article forty-one of the public health law, whether or not such services are rendered directly by a hospital), surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) Psychiatric, physical and occupational therapy and rehabilitation; (iii) Any non-medical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of this state; and (iv) Any other professional health services; all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury. For the purpose of determining basic economic loss, the expenses incurred under this paragraph shall be in accordance with the limitations of section five thousand one hundred eight of this article.

further limited to three years. Payment of benefits for "basic economic loss" under the No-Fault law must therefore cease after the No-Fault carrier has expended $50,000 in total, or after three years for loss of earnings, whichever comes first.

In *Dietrick*, the sum total of all compensation awards, including payment for medical expenses ($12,647.50), temporary total disability ($3,150.27), permanent partial disability ($11,460.75) and permanent facial disfigurement ($5,000), did not exceed the $50,000 limit. Therefore, the amounts of the payments were clearly equivalent to basic economic loss.

In *Johnson*, the weekly payments continued beyond three years and, when combined with medical payments, exceeded $50,000. Either event could be sufficient to render the surplus compensation awards non-equivalent to "basic economic loss" as defined in the No-Fault law. The court's comment that the payments made in *Dietrick* "extend[ed] beyond the three-year period for payment for loss of wages set by Insurance Law section 5102(a)(2)" seems unsupported by the facts.

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39. N.Y. INS. LAW § 5102(a)(2) (McKinney 1994). The statute states:

> Loss of earnings from work which the person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to two thousand dollars per month for not more than three years from the date of the accident causing the injury. An employee who is entitled to receive monetary payments, pursuant to statute or contract with the employer, or who receives voluntary monetary benefits paid for by the employer, by reason of the employee's inability to work because of personal injury arising out of the use or operation of a motor vehicle, is not entitled to receive first party benefits for "loss of earnings from work" to the extent that such monetary payments or benefits from the employer do not result in the employee suffering a reduction in income or a reduction in the employee's level of future benefits arising from a subsequent illness or injury.

*Id.*

40. *Dietrick*, 76 N.Y.2d at 250, 556 N.E.2d at 1109, 557 N.Y.S.2d at 302.


42. N.Y. INS. LAW § 5102(a)(1) (McKinney 1994).

While the *Johnson* court properly observed that under the holding in *Dietrick* weekly payments of compensation for permanent disability are no more subject to a compensation carrier's lien rights than a lump-sum payment of compensation for permanent disability, the court did not consider the significance of the amount and period of payment of the compensation award. Therefore, under the provisions of the No-Fault law, while the loss of salary in the first month following an accident is basic economic loss, loss of salary in the thirty-seventh month is not.\(^4\) A medical bill incurred after the No-Fault carrier has paid $10,000 in benefits is basic economic loss. However, the same bill submitted after the carrier has expended $50,000 is not.\(^5\) In *Dietrick*, the compensation award was less than $50,000 and, under the Court of Appeals definition, was equivalent to basic economic loss. In *Johnson*, the ongoing weekly payments for permanent disability stretched beyond both three years and $50,000. Thus, according to prior definitions, the payments were not equivalent to basic economic loss.

The Insurance Law standard for basic economic loss is twofold: (1) the payment must be for lost earnings or medical expenses, and (2) the payment must be within the three-year limitation or $50,000. The *Johnson* court held that weekly compensation payments for permanent partial disability are equivalent to basic economic loss under *Dietrick* and that the first element was therefore satisfied by implication. The court found the second element of statutory time and dollar amount limitations irrelevant.

Furthermore, the *Johnson* court gave little consideration to the underlying policy of section 29(1-a). In a negligence action arising out of a motor vehicle accident, a plaintiff is prohibited from recovering only those items of damage which constitute basic economic loss.\(^6\) Lost wages and medical expenses which

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44. N.Y. Ins. Law § 5102(a)(1) (McKinney 1994).
46. N.Y. Ins. Law § 5104(a) (McKinney 1985). The statute states:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in
exceed basic economic loss, including lost earnings and medical expenses in excess of $50,000 and those sustained beyond three years from the date of the accident, may be pleaded, proven, and recovered in such a lawsuit. The legislative intent underlying section 29(1-a) was to place the compensation claimant on an equal footing with the general public by preventing the compensation carrier from asserting a lien or a credit against an injured workers' third-party recovery which could not have been asserted by a No-Fault carrier. The result of the Johnson ruling not only eviscerates the compensation carrier's lien for payment of benefits capable of collection from No-Fault, it eradicates the lien altogether. Although this may not affect the rights of a compensation claimant vis-à-vis a non-compensation plaintiff, it places a compensation claimant injured in a vehicular accident in a far better position than a worker injured by any other means.

V. UNINSURED MOTORIST RECOVERIES

As previously described, section 29(1) grants the compensation carrier "a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise" who may "by negligence or wrong" have injured an employee, provided that "such other" is "not in the same employ." In the area of uninsured motorist benefits, issues have arisen as to whether the carrier responsible for the payment of such benefits constitutes "such other" within the meaning of the statute and, further, whether the compensation carrier's lien rights attach to a recovery of uninsured motorist benefits.

this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss. The owner, operator or occupant of a motorcycle which has in effect the financial security required by article six or eight of the vehicle and traffic law, or which is referred to in subdivision two of section three hundred twenty-one of such law, shall not be subject to an action by or on behalf of a covered person for recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.

47. N.Y. INS. LAW § 5104(a)(1) (McKinney 1985).
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WORKERS' COMPENSATION LIENS

By its very words, the applicability of section 29(1) and its concomitant creation of lien rights is limited to an injured worker's recovery from a third-party to the employment relationship. The threshold issue, therefore, is whether the uninsurance carrier is such a third party.

In Commissioners of the State Ins. Fund v. Miller, the Appellate Division, First Department held that absent any recovery by an injured worker from the alleged wrongdoer, a compensation carrier "can have no lien on the sums recovered." The court, in reviewing section 29(1), concluded that the law does not give "the compensation carrier a lien on all recoveries an injured worker obtains from others, regardless of the source." Rather, the carrier's lien right is limited to recoveries from responsible third-party tortfeasors. The compensation carrier's argument that the uninsurance carrier should "be deemed the alter ego of the tortfeasor" was rejected on the grounds that such carrier's responsibility to the injured worker "is contractual, although premised in part upon the contingency of a third party's tort liability." Accordingly, an injured worker's recovery from his own automobile insurance carrier, pursuant to a contract of insurance which he had purchased himself, was found not to be the type of recovery against which a compensation carrier could assert a lien under section 29(1).

49. 4 A.D.2d 481, 166 N.Y.S.2d 777 (1st Dep't 1957).
50. Id. at 483, 166 N.Y.S.2d at 779.
51. Id. at 482, 166 N.Y.S.2d at 778.
52. See Vinson v. Berkowitz, 83 A.D.2d 531, 532-33, 441 N.Y.S.2d 460, 462 (1st Dep't 1981) (holding that a workers' compensation carrier had no lien against recoveries received by an injured worker unless such recoveries were from third-party tortfeasors and the carrier had paid the $50,000 basic economic loss provided for by statute).
53. Kelly, 4 A.D.2d at 482, 166 N.Y.S.2d at 779.
54. Id.
55. Id. This rule has also been found to apply to liens asserted pursuant to the N.Y. WORK. COMP. LAW § 227 (McKinney 1994). See Matter of Vartanian, 54 Misc. 2d 983, 984, 283 N.Y.S.2d 762, 764 (Sup. Ct. 1967) (holding that an award to an insured party injured in an "uninsured
The case of Hartford Accident and Indemnity Co. v. Glickman\(^{56}\) considered the effect of an available recovery from the Motor Vehicle Accident Indemnification Corporation (MVAIC).\(^{57}\) As in Miller, the injured worker in Glickman purchased uninsured motorist coverage from his automobile insurance carrier which did not contain a provision requiring the offset of workers’ compensation benefits.\(^{58}\) Based on the similar purposes of an MVAIC recovery and an uninsured motorist recovery, the compensation carrier in Glickman argued that the injured worker was “entitled to no greater benefit as an ‘insured’ person paying a premium pursuant to his insurance contract for additional benefits than a ‘qualified’ person having no insurance coverage and getting benefits pursuant to [MVAIC] without any cost whatsoever.”\(^{59}\)

The Glickman court, following the decision in Miller, concluded that an uninsured recovery is contractual in nature and not subject to a section 29 lien or credit.\(^{60}\) The distinction between a recovery based on premium paid and an MVAIC recovery is of critical significance, as the court held that “the workmen’s compensation carrier has no right to cash in on what Glickman chose to cover himself for an additional premium.”\(^{61}\) Therefore, in Glickman, as in Miller, the court concluded that the injured worker was entitled to pursue and recover uninsured motorist benefits from his own insurance policy free of any workers’ compensation implications.\(^{62}\)

\(^{57}\) Id. at 35, 374 N.Y.S.2d at 567. No such recovery was available at the time Miller, supra, was decided. Id. at 36, 374 N.Y.S.2d at 568. Here, the compensation carrier had no right to limit its liability simply because the insured chose to protect himself by purchasing additional coverage. Id. at 36, N.Y.S.2d at 569.
\(^{58}\) Id. at 35, 374 N.Y.S.2d at 568.
\(^{59}\) Id.
\(^{60}\) Id. at 36, 374 N.Y.S.2d at 569.
\(^{61}\) Id.
\(^{62}\) Id.
VI. ATTORNEY’S FEES

In cases where the compensation carrier possesses a lien on the third-party recovery, either because the third-party action does not involve a vehicular accident subject to the No-Fault law or because the compensation carrier has made payments not equivalent to basic economic loss, the compensation carrier is required to bear a proportionate share of the attorneys’ fees and expenses incurred in prosecuting the third-party lawsuit. Under section 29(1), the calculation of the compensation carrier’s proportionate share is governed by equitable considerations.

The definitive case regarding equitable apportionment of attorney fees is the Court of Appeals decision in *Kelly v. State Ins. Fund*. The *Kelly* court recognized that the compensation carrier obtains two benefits from the settlement of a third-party action, one immediate and one deferred. The immediate benefit is the recovery of a lien; the deferred benefit is that the carrier obtains a credit against future payments of compensation in an amount equivalent to the injured worker’s net recovery.

Prior to *Kelly*, a compensation carrier was only deemed to benefit by a third-party settlement to the extent that it recovered a lien. The *Kelly* decision required consideration of both the existing lien and the present value of any potential future payments of compensation in determining the extent to which a compensation carrier benefits from a third-party settlement. The sum total of the lien plus the present value of future compensation rights, when divided by the gross third-party recovery, reveals the percentage of the third-party recovery which can “be deemed for the benefit of” the compensation settlement.

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63. § 5102 *supra* note 38; *Dietrick, supra*, and *Johnson, supra*, and subject to the Court of Appeals decision in the latter.
64. § 29(1) *supra* note 1; see also David Grey, *supra* note 9, at 56-62.
65. § 29(1)*supra* note 1.
67. *Id.* at 136, 456 N.E.2d at 792, 468 N.Y.S.2d at 851.
68. *N.Y. WORK. COMP. LAW* § 29(2) (McKinney 1993).
70. *Id.* at 135, 456 N.E.2d at 792, 468 N.Y.S.2d at 851.
carrier. The court may also consider any other equitable factors in deciding whether any additional or lesser portion of the attorneys’ fees may be charged to the compensation carrier.

Once the percentage of the third-party recovery that inures to the benefit of the compensation carrier has been established, the carrier is responsible for an equal percentage of the attorney fees and expenses incurred in obtaining the third-party recovery. Compensation carriers typically pay their share of the attorney fees by reducing the lien by the amount in question. Where the amount of attorney fees chargeable to the compensation carrier exceeds the amount of the lien, the carrier may contribute “fresh cash” to the third-party settlement.

The benefit to an injured worker of a lien waiver, and even the benefit of the contribution of fresh cash by a compensation carrier may be rendered somewhat illusory when the carrier’s section 29(4) credit is considered. As previously discussed, after the third-party action is settled, section 29(4) gives the compensation carrier a credit for further payments of compensation to the extent of the injured worker’s net third-party recovery. In effect, any lien waived by the carrier, as well as any fresh cash contributed by the carrier, by increasing the injured worker’s net recovery, increases the extent of the credit. Assuming that an ongoing right to compensation presently exists, or arises in the future, and that such right exceeds the value of the net third-party recovery, the injured worker often finds that all he has gained by pursuing a third-party lawsuit is the immediate payment of money to which he

71. § 29(1) supra note 1; see also Kelly, 60 N.Y.2d 131, 456 N.E.2d 791, 468 N.Y.S.2d 850 (1983).
73. § 29(1) supra note 1.
74. See Estate of Cali, N.Y. L.J. April 7, 1992 p. 34.
75. § 29(4) supra note 1.
76. § 29(4) supra note 1.
equitable factors portion of the sation carrier. hat inures to the established, the attorney fees rty recovery of the attorney. Where the nsion carrier contribute "fresh er, and even the a compensation en the carrier's usly discussed, 29(4) gives the payments of s net third-party rrier, as well as increasing the extent of the compensation that such right rly, the injured issuing a third- to which he

1994] WORKERS' COMPENSATION LIENS 175 would otherwise have been entitled on an ongoing weekly basis.78

In situations where third-party counsel obtains a waiver of the entire compensation lien and further obtains the contribution of fresh cash by the compensation carrier, a question arises as to the proper amount of the attorney fees. In addition to receiving a percentage of the recovery from the third-party tortfeasor, attorneys have occasionally asserted an entitlement to an additional fee based on the waiver of the compensation lien or the contribution of additional funds by the compensation carrier.79 The apparent justification for such application is that the waiver or contribution constitutes an additional benefit and recovery for the client.80

In Matter of Castiglia,81 the Bronx County Surrogate's Court approved additional attorney fees in a negligence claim based upon the compensation carrier's contribution of fresh cash to the settlement.82 In Castiglia, the third-party defendant's insurance

78. This situation is usually described as "deficiency compensation" after the language of § 29(4) and is addressed in detail in David Grey, supra note 9, at 56-62. The 1990 amendments to the Workers' Compensation Law included substantial increases in weekly compensation rates and are likely to result in an increasing number of deficiency compensation cases.

79. Matter of Castiglia, 158 Misc. 2d 611, 613, 601 N.Y.S.2d 559, 560 (Sur. Ct. 1993)(where carrier who settled claim was also carrier who paid compensation benefits the attorney was entitled to one third of total fresh money minus disbursements plus two thirds of waived lien without any reduction for carrier's share of disbursements); Matter of Purtill, 111 Misc. 2d 916, 917, 445 N.Y.S.2d 400, 402 (Sur. Ct. 1981)(in wrongful death action attorneys were not allowed to recover under contingent retainer agreement where fees were calculated using benefits on which compensation lien was waived); Brock v. Mack Trucks, 178 A.D.2d 701, 577 N.Y.S.2d 149 (3d Dep't 1991)(counsel fees found fair as they represented one third of the total recovery).


81. Id. at 611, 601 N.Y.S.2d 560 (1993) (where the court held the amount which should be used to compute counsel's one-third fee, and which amount represents the value of the settlement to the client, is a sum equal to the "fresh money" plus two-thirds of the waived lien in recognition of the fact that the carrier could only collect two-thirds of the lien because it would be responsible to pay the legal fees equal to one-third of the lien).

82. Id. at 613, 601 N.Y.S.2d at 560.
carrier was also the compensation carrier. Under the terms of the settlement agreement, the carrier paid $42,500 in fresh cash and additionally waived a worker’s compensation lien of $24,362.92. Both counsel and the court assumed that the carrier would be automatically required, pursuant to *Kelly*, to reduce its lien by one-third to $16,241.95. Counsel sought, and the court approved, “a legal fee equal to one third of $58,567.05 consisting of $42,325.10 (the net amount of the fresh money, $42,500 minus disbursements of $174.90) plus $16,241.95 (two thirds of the $24,362.29 waived lien).” The decision resulted in an award of counsel fees of almost fifty percent of the actual gross recovery.

The decision in *Castiglia* omits any mention of the compensation carrier’s potential future liability. If, as discussed previously, the compensation carrier had either an ongoing or a potential future responsibility for benefit payments, then the purported benefit to the plaintiff of the lien waiver may in fact have been illusory in that the carrier obtained a credit in an amount greater than two-thirds of the lien it “waived” by inducing the third-party settlement. Under those circumstances, an additional legal fee based on the lien waiver would seem inappropriate in the absence of any actual benefit to the client. Even if the carrier had no ongoing or potential future responsibility for benefit payments, one must consider whether the waiver of a lien constitutes a “recovery” against which a contingent fee may be asserted. Therefore, until further guidance is provided in the form of an appellate division decision or official ethics opinion, the author would advise counsel to carefully consider the potential ramifications of an application for an additional legal fee based on the waiver of a compensation lien or the contribution of fresh cash by a compensation carrier intended to satisfy the compensation carrier’s obligation to pay attorney fees apportioned under section 29(1).

83. *Id.* at 612, 601 N.Y.S.2d at 559.
84. *Id.*
85. *Id.* (whether this was true may be arguable); see David Grey, *supra* note 9, at 56-62.
86. *Castiglia*, 158 Misc. 2d at 614, 601 N.Y.S.2d at 561.
CONCLUSION

As a result of legislative and judicial activity over the past fifteen years, the extent to which workers' compensation liens may be asserted in motor vehicle accident claims has been substantially reduced, and will be eliminated by Johnson v. Buffalo & Erie Private Indus. Council,87 if not reversed or modified by the Court of Appeals.

Section 29(1-a) eliminates compensation liens to the extent that the payments made are equivalent to basic economic loss.88 The extent to which compensation payments are considered to be equivalent to basic economic loss was delineated by the Court of Appeals in Dietrick v. Kemper Ins. Co.89 and was significantly expanded by the Appellate Division, Third Department in Johnson.

Under all reported appellate decisions, a recovery of uninsured motorist benefits, under an insurance policy purchased by the injured worker, is not subject to a workers' compensation lien under section 29 of the Workers' Compensation Law.

The recent decision in Matter of Castiglia90 indicates that there may be a basis upon which counsel can request an additional legal fee based on the waiver of a compensation lien or the contribution of fresh cash by the compensation carrier. However, this surrogate's court decision may be limited to its facts and counsel are advised to proceed with caution in this area.

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87. 192 A.D.2d 763, 596 N.Y.S.2d 186 (3d Dep't 1993) (leave to appeal to the Court of Appeals pending); see also supra note 27 and accompanying text.
88. See supra note 10 and accompanying text.
89. 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990); see also supra note 19 and accompanying text.
90. 158 Misc. 2d 611, 601 N.Y.S.2d 559 (Sur. Ct. 1993), see also supra note 81 and accompanying text.