

ATTORNEYS WILL NOT HOLD DEFENDANTS HARMLESS

by James Roth with assistance of Joshua Hoffman

Within the last decade, it has become standard practice for defense counsel, particularly in New York, to require as a condition to settlement that plaintiff's counsel agree to indemnify and hold harmless defendant, its insurer, and attorney from any liens and/or third-party claims. Defense counsel's interest in requiring the inclusion of indemnification and hold harmless provisions in the settlement papers is obvious in that the defendant naturally desires to eliminate potential post-litigation exposure. Post-litigation exposure can potentially arise in the form of actions brought by lien holders against the releases, the insurance carriers who pay the settlement and their defense counsel for payment of those liens.

The following article will provide an overview and practical analysis of the recent ethics opinion from the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ("Committee on Ethics") prohibiting plaintiff's counsel from agreeing to indemnify and hold harmless the defendant from claims arising out of defendant's payment of settlement monies, while concurrently prohibiting defendant's counsel from requesting the inclusion of such language. Formal Opinion 2010-3: Settlement Agreements Requiring the Financial Assistance of Counsel available at <http://www.abcnyc.org/nycbar/index.php/ethics/ethics-opinions-local/2010-opinions/844-settlement-agreements-requiring-the-financial-assistance-of-counsel>.

The article will then address some of the issues that may arise from this change in practice and offer some practical tips to defense counsel to help avoid post litigation exposure to their clients and to plaintiff's counsel to allow cases to be settled in a way that minimizes exposure regarding liens.

In determining that it is unethical to hold harmless and indemnify the defendant for claims arising from the payment of settlement monies, the Committee on Ethics relied upon a number of the New York Rules for Professional Conduct. First, the Committee looked to Rule 1.8(e)(1), which generally prohibits an attorney from advancing or guaranteeing financial assistance to his client. N.Y. Prof'l Conduct R. 1.8(e)(1) (2010). It was found that plaintiff counsel's post settlement agreement to hold harmless and indemnify the defendant for third party claims would actually be the same thing as an attorney "guarantee[ing] financial assistance to the client." Therefore, the Committee on Ethics determined that it is unethical for a plaintiff's attorney to agree to hold harmless and indemnify defendant for post settlement third party claims as in doing so they are guaranteeing financial assistance to their client in violation of Rule 1.8(e)(1).

The Committee on Ethics next determined that the inclusion of hold harmless and indemnification language in the settlement papers also creates an impermissible conflict between the plaintiff attorney's personal, business and financial interest and his client's decision to settle in violation of Rule 1.7(a)(2). N.Y. Prof' Conduct R. 1.7(a)(2). Pursuant to New York Professional Conduct Rule 1.7(a)(2), "a lawyer shall not represent a client if a reasonable lawyer would conclude that...there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The Committee on Ethics determined that the conflict here manifests itself in the form of the client's decision to settle, (which Rule 1.2(a) makes binding on the client's attorney), and the plaintiff attorney's potential unwillingness to hold harmless and indemnify defendants for potentially significant known and possible unknown liens against his client. N.Y. Prof'l Condu R. 1.2(a).

Continuing, the Committee on Ethics also determined that it was impermissible under the Rules of Professional Conduct for defense counsel to ask for or demand the inclusion of hold harmless and indemnification language in a settlement agreement. Such a request or demand in light of the Committee's decision prohibiting plaintiff's counsel from holding harmless and indemnifying defendant would be in violation of Rule 8.4(a), prohibiting a lawyer from knowingly assisting or inducing another lawyer to violate the Rules of Professional Conduct. N.Y. Prof Conduct R. 8.4(a).

Prior to this opinion, defendants and their insurers were able to rest assured that their monetary exposure was terminated upon execution of the settlement papers that contained hold harmless and indemnification language. Now that plaintiff's counsel is prohibited from indemnifying and holding harmless defendants and his insurer for third-party claims arising from the payment of settlement monies, exposure is potentially ongoing and in unknown amounts. As a consequence, as the parties desire to expeditiously settle a case may be impeded due to defendant's hesitancy to settle when the identity and amount of potential third-party claims are unknown.

The first step that should be taken is to identify what third parties can bring a post-settlement action to recover monies owed by the plaintiff. This inquiry was greatly simplified in 2009 with the passage of New York Anti Subrogation Statute, which restricts the number of parties who can bring subrogation actions. McKinney's Gen Obl. Law §5-335. Pursuant to the Anti-Subrogation Statute, "[e]xcept where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party." *Id.* Statutory rights of reimbursement exist for the reimbursement of no-fault payments, Insurance Law §5104(b); Workers' Compensation benefits, Workers' Comp. Law §29(1); Medicare payments, 42 U.S.C. §1395; Medicaid payments, 42 U.S.C. §1396k; and, self-funded group health care plans governed by ERISA, 29 U.S.C. §1001-1461. It should be noted however that Medicaid payments are only reimbursable from the portion of the settlement proceeds used to reimburse past medical expenses.

Once the possible sources from which post-settlement exposure may arise are identified, it becomes easier for defense and plaintiff's counsel to formulate strategies to minimize the impact of the prohibition on the inclusion of hold harmless and indemnification language in settlement agreements. Whether or not a plaintiff is subject to a lien from the above mentioned sources will for the most part, be easily identified and in any event, likely revealed through discovery. However, with regard to Medicare and/or Medicaid liens, a defendant and its insurer can take additional steps to ensure there are no unknown Medicare and Medicaid liens. Because every insurance company is required to be registered as a Responsible Reporting Entity, they have access to the Center for Medicaid/Medicare Services ("CMS"). The insurance company can simply query CMS to determine whether the plaintiff is a Medicaid or Medicare beneficiary. This is done by simply providing the plaintiffs: (1) social security number; (2) first initial of first name; (3) first 6 characters of last name; (4) date of birth; and, (5) gender. If the plaintiff is not a Medicare or Medicaid beneficiary, the defendant need not be wary of any liens of this nature. (There is a concern, however, for benefits paid after a settlement that arise out of the subject accident, the potential exposure when this happens. That will be the subject of a future article.)

With all this said, the simplest strategy to protect defendant's interest in eliminating post-settlement exposure and plaintiff's interest in eliminating impediments to settlement is to obtain

written consent or waivers from all potential lien holders, or failing that, to include a stipulation in the settlement papers that plaintiff's counsel will hold a certain sum of money from the settlement proceeds in escrow to be used to pay off plaintiff's liens. In fact, New York Rule of Professional Conduct 1.15(c) requires counsel to segregate and protect settlement funds when counsel is aware of a lien against those funds. The loss of the hold harmless and indemnity provision by plaintiff's counsel not mean that defense counsel does not have recourse to restrict post-settlement exposure, it just makes it more difficult and perhaps a more lengthy process as counsel attempts to get written permission from potential or actual lien holders. It also may require plaintiff's counsel to escrow funds that the client wants (usually right away), which may make it more difficult to settle cases.