ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE "HOLD HARMLESS" DEBACLE OR ABANDON ALL HOPE YE WHO ENTER INTO THIS AGREEMENT [1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the lobby bar to find a melancholy Frank.

Frank Falls, fellow comrade in arms and noted defense attorney, was certain that he was in malpractice!

The "issue" involved a lien claim affidavit attached to a Compromise and Release Agreement that one of Frank's attorneys had walked through the Board and on which he had obtained approval from the Workers' Compensation Judge (WCJ).

This particular Compromise and Release and Affidavit regarding lien claims involved a case in which the applicant's attorney was none other than Ron Summers, George the Bartender's workers' compensation attorney.

At the Board at which Ron appeared exclusively some WCJ's insist that defendants consent to "hold the applicant harmless" from liability to lien claims, including the lien of the Employment Development Department.

As Frank continued with his tale of woe I mentally reviewed the history of lien claim procedures and was formulating my guess about what his problem might be.

Time for a brief history lesson. In the 1980's the Board approved the following language with regard to lien claims which is still used today:[2]

> ". . . defendant has agreed to hold the worker or dependent harmless from all lien claims and has agreed to pay, adjust, or litigate all liens."

However, in the early 1970's all Compromise and Release Agreements (which were on a different form then) not only settled the applicant's case but all liens of record.

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[1] For those new patrons to the lobby bar , George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] The entire text can be found in Section 10770(c) of the WCAB Rules of Practice and Procedure.

In those days it was rare to find a case in which a lien claim was excluded from the final disposition on the Compromise and Release Agreement.

Throughout the years this has changed and it is now routine for the parties to execute a Compromise and Release Agreement and "pay, adjust, or litigate all liens" in subsequent proceedings.

Certain applicant attorneys and a few WCJ's also insist that the defendant add language to the Compromise and Release Agreement stating that the defendant will agree to "hold the applicant harmless" from lien claims.

I came back to reality in time to hear Frank explaining to me that both the WCJ and applicant attorney Ron Summers had insisted that as part of the Compromise and Release Agreement Frank's attorney must enter into a "hold harmless" agreement with respect to the lien of Dr. Nickelsberg (Ron's favorite co-conspirator and go-to primary treating physician).

As the client in this case, Integrity Insurance Company, had a medical provider network (MPN) and all appropriate notices had been sent out, Frank's attorney was certain that his client would be absolved from liability for the payment of the liens of Dr. Nickelsberg.

However, Frank told me that his attorney had received a letter from Ron indicating that as a result of the "hold harmless" agreement Integrity Insurance Company was obligated, as a matter of law, to make payment to Dr. Nickelsberg.

Frank called Ron on behalf of his attorney and argued that since the applicant had elected to treat outside the MPN the applicant, not his client, was liable for paying the charges of Dr. Nickelsberg.

Ron advised that this would be true except for the fact that Frank's attorney had executed a "hold harmless" agreement meaning that Frank's client was responsible for the services rendered by Dr. Nickelsberg to the applicant. Frank could tell Ron must have been beaming while explaining this.

Frank wanted to know my opinion on this issue. I advised Frank that unfortunately the Board had recently ruled on this exact set of facts in its panel decision in *Manuel Barajas v. F&H Cold Storage; Applied Risk Omaha* 2010 Cal. Wrk. Comp. P.D. LEXIS 396 (Cal. Wrk. Comp. P.D. 2010).[3]

I told Frank that a "hold harmless" agreement is basically a strict liability promise that the defendant will pay the legal obligations of the applicant with respect to all services delivered by a medical provider.

[3] Anyone wishing a copy of the *Barajas* case please submit your request via e-mail.

I emphasized to Frank that as far as I was concerned any defense attorney entering into such an agreement was condemning themselves to a state of agony and misery. I added that the phrase "hold harmless" should be "stricken from the record," deleted from the vocabulary of every defense firm.

I felt very sorry for Frank, so sorry I did not mention that in *Barajas* the Board pointed out that the defendant would never have been liable for the self-procured medical treatment were it not for the "hold harmless" agreement.

In its decision the Board pointed out that by "holding the applicant harmless" from a medical provider's lien the defendant promised to make payment of any amounts for which the applicant would be held liable.

In Frank's case the applicant received treatment from Dr. Nickelsberg and certainly would be liable for Dr. Nickelsberg's medical bills. If Frank's attorney had not added the "hold harmless" language the medical bills would have been denied as Frank's client had a Medical Provider Network and although the applicant could certainly go to any physician he wanted (such as Dr. Nickelsberg) he would also be liable for the billings.

The "hold harmless" ensured that Dr. Nickelsberg would receive payment from the defendant.

Needless to say Frank was not a happy camper when I left the bar and looked anything but harmless, but could you really hold that against him?

DISCLAIMER:

While all of the characters at the lobby bar are imaginary aside from Kim, George and myself, the storyline is not.

So-called "hold harmless" agreements have been around for years and have been recommended by WCJ's and applicant attorneys alike.

A "hold harmless" agreement executed by a defendant promising to indemnify the applicant for any liability to a lien claimant may also involve defense costs if the applicant decides to retain an attorney to defend his liability.

In *Barajas* the Board specifically indicated that the error of the defendant was in executing the "hold harmless" agreement. It is costly and easily avoidable blunders like these that we can ill afford to make.

Make mine a double, George.

-Joe Truce