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Journal of Civil Rights and Economic Development

Volume 6
Issue 1 *Volume 6, 1990, Issue 1*

Article 8

September 1990

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Recommended Citation

Keller, Mark and Vomero, Christine (1990) "Dietrick v. Kemper Insurance Co.--The First Step Toward Limiting Workers' Compensation Liens on Third-Party Tort Recoveries," *Journal of Civil Rights and Economic Development*: Vol. 6 : Iss. 1 , Article 8.
Available at: https://scholarship.law.stjohns.edu/jcred/vol6/iss1/8

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DIETRICK v. KEMPER INSURANCE CO. — THE FIRST STEP TOWARD LIMITING WORKERS' COMPENSATION LIENS ON THIRD-PARTY TORT RECOVERIES

In New York, a primary aim of both the Workers' Compensation Law[1] (hereinafter WCL) and the Comprehensive Motor Vehicle Insurance Reparation Act[2] (hereinafter no-fault)[3] is the com-

[1] N.Y. WORK. COMP. LAW §§ 1-157 (McKinney 1965 & Supp. 1990). The Workers' Compensation Law was previously named the Workmen's Compensation Law. *Id.* The original Workmen's Compensation Law was found to violate the due process clauses of both Federal and New York State constitutions because it deprived owners of property by imposing liability on employers without regard to fault. *See* 1 A. LARSON, WORKMEN'S COMPENSATION LAW, § 5.20 (1990). In 1913, a state constitutional amendment (N.Y. CONST. art. I, § 18) was enacted to resolve due process problems in the original act, and the current version of the WCL was put into effect. *See* New York Cent. R.R. v. White, 243 U.S. 188, 195-96 (1915). It has since been established that the only requirement of a compensation system that has no regard to fault is that it is reasonable, meaning that the recovery is limited and it goes directly to the designated employee. *See, e.g., White*, 243 U.S. at 201 (highly likely that due process would be violated if all common law between employer and employee is disregarded without reasonable substitute); Sweeting v. American Knife Co., 226 N.Y. 199, 201, 123 N.E. 82, 83 (1919) (burden placed on employees must be reasonable), *aff'd*, 250 U.S. 596 (1919).

The second attempt at creating a comprehensive WCL has withstood all constitutional challenges against it in both the United States Supreme Court and New York Court of Appeals. *See White*, 243 U.S. at 206-09 (system of compulsory compensation not offensive to fourteenth amendment); Jensen v. Southern Pac. Co., 215 N.Y. 514, 523, 528-29, 109 N.E. 600, 602-04 (1915) (WCL held not to violate fourteenth amendment or state due process clauses), *rev'd on other grounds*, 244 U.S. 205 (1917). *See also* 1 A. LARSON, WORKMEN'S COMPENSATION LAW, §§ 5.20, 5.30 (1990) (history of WCL in United States and New York State).

[2] N.Y. INS. LAW §§ 5101-08 (McKinney 1985 & Supp. 1990). *See* Comment, *New York Adopts No-Fault: A Summary and Analysis*, 37 ALB. L. REV. 662, 664-65 (1973) [hereinafter *New York Adopts No-Fault*]. "Prior to the recent trend toward no-fault systems of automobile reparations, the law of negligence provided the basis of our automobile insurance system." *Id.* The fault approach to reparations seemed to work well at a time when automobile use was uncommon. *Id.* at 665-66. However, when automobiles became part of everyday life, fault based systems were criticized as unreliable and leading to congestion in the courts. *Id.* In 1974, the New York Comprehensive Motor Vehicle Insurance Reparations Act went into effect, and although it does not contain a declaration of leglislative purpose, it seems primarily to compensate victims for economic loss. *Id.* at 670-71. The Act was generally opposed by the trial bar. *See* DiFede, *Insurance Law*, 30 SYRACUSE L. REV.

pensation of injured parties[4] without regard to fault.[5] When an

313, 342 (1979). In 1975, the Act's constitutionality was challenged, but the New York Court of Appeals held that it met all constitutional standards. *See* Montgomery v. Daniels, 38 N.Y.2d 41, 45, 340 N.E.2d 444, 446, 378 N.Y.S.2d 1, 4 (1975).

[3] N.Y. INS. LAW §§ 5101-08 (McKinney 1985 & Supp. 1990).

[4] *See* Grello v. Daszykowski, 58 App. Div. 2d 412, 413, 397 N.Y.S.2d 396, 397 (2d Dep't 1977), *rev'd on other grounds*, 44 N.Y.2d 894, 379 N.E.2d 161, 407 N.Y.S.2d 633 (1978). *See also* Kelly v. Sugarman, 12 N.Y.2d 298, 300, 189 N.E.2d 613, 615, 239 N.Y.S.2d 114, 117 (1963) (purpose of WCL was, in part, to protect employees and dependents); Fox v. Atlantic Mut. Ins. Co., 132 App. Div. 2d 17, 23, 521 N.Y.S.2d 442, 446 (2d Dep't 1987) (no-fault insurance scheme adopted to ensure injured motorists receive full compensation for basic economic losses); State Farm Mut. Auto. Ins. Co. v. Brooks, 78 App. Div. 2d 456, 459, 435 N.Y.S.2d 419, 421-22 (4th Dep't 1981) (purpose of no-fault is not to give victim windfall, but to compensate victim for lost earnings); Winfield v. New York Cent. & Hudson River R.R., 168 App. Div. 351, 353, 153 N.Y.S. 499, 500 (3d Dep't 1915) (WCL intended to provide worker with state system of insurance), *aff'd*, 216 N.Y. 284, 110 N.E. 614 (1915), *rev'd on other grounds*, 244 U.S. 147 (1917); Skakandy v. State, 188 Misc. 214, 226, 66 N.Y.S.2d 99, 112 (N.Y. Ct. Cl. 1946) (purpose of WCL was to give workmen in specified trades compensation for injury received in course of employment), *aff'd*, 274 App. Div. 153, 80 N.Y.S.2d 849 (3d Dep't 1948), *aff'd mem.*, 298 N.Y. 886, 84 N.E.2d 804, 66 N.Y.S.2d 99 (1949); GOVERNOR'S BILL JACKET, L.1978, ch.572, BUDGET REPORT ON BILLS, S. 10275-B, at 1 (1978) (main objective of no-fault is that injured party be made whole for economic loss); Brief for Appellant at 5, Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990) (No. 90-137) [hereinafter Appellant's Brief] (intent of both workers' compensation and no-fault was to provide quick economic relief without regard to fault); Schreier, *No Fault and its Relationship to Workmen's Compensation — The Lien Problem*, 50 N.Y. ST. B.A.J. 7, 7 (1978) (WCL's purpose is to provide benefits for employees injured during course of employment).

Another purpose of the WCL and no-fault was to limit negligence suits against both employers and automobile insurance carriers. *See* Cooper v. United States, 635 F. Supp. 1169, 1171 (S.D.N.Y. 1986). *See also* Southern Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (WCL was new remedy enacted for purpose of reducing expenses, uncertainties and delays of litigations); Fallone v. Misericordia Hosp., 23 App. Div. 2d 222, 227, 259 N.Y.S.2d 947, 952 (1st Dep't 1965) (WCL assures not only certain compensation, but also protects employers against excessive injury claims), *aff'd*, 17 N.Y.2d 648, 216 N.E.2d 594, 269 N.Y.S.2d 431 (1966); Gegan, *The Compensation Carrier's Right to Restitution For Medical Expenses Through A Lien On The Employee's Tort Recovery*, 52 ST. JOHN'S L. REV. 395, 396 (1978). "From the very outset, one basic purpose of the Workers' Compensation Act was to shift the cost of medical care from the employee to the employer who could better carry and spread the economic risk attending industrial accidents." *Id.* WCL also reasonably distributes the burden of compensation payments over the affected businesses. *See Jensen*, 215 N.Y. at 519, 109 N.E. at 601. The intent of the legislature in enacting no-fault was to lessen the cost of auto liability insurance, to increase benefits to victims, and to release the courts of the excessive number of auto accident negligence suits. *See Grello*, 58 App. Div. 2d at 427, 397 N.Y.S.2d at 406. This goal may not have been achieved. *See* DiFede, *supra* note 2, at 348 (although no-fault attempts to reduce insurance premiums, consumers are paying higher premiums).

[5] *See Grello*, 50 App. Div.2d at 414, 397 N.Y.S.2d at 397 (both WCL and no-fault are to compensate without regard to fault). *Compare* N.Y. WORK. COMP. LAW § 10 (McKinney 1965 & Supp. 1990) *with* N.Y. INS. LAW § 5104(a) (McKinney 1985 & Supp. 1990).

N.Y. WORK. COMP. LAW § 10 states that "every employer subject to this chapter shall . . . secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to

employee is injured in a work-related automobile accident, she

fault . . . ." *Id.*

Under the Workers' Compensation Law, an employer compensates an employee for the employee's work-related injuries regardless of fault, except when: 1) the injury resulted solely from the fact that the employee was intoxicated while on the job, or 2) the employee intended to kill himself or another and was injured as a result, or 3) the injury was caused by the employee's voluntary participation in a non-work related athletic activity. *Id.* Under Workers' Compensation Law, damages for pain and suffering as well as punitive damages are not available to the injured employee. *Id.*

N.Y. INS. LAW § 5104(a) states in pertinent part:

> 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 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.

Id. Thus, § 5104(a), by excluding recoveries for basic economic loss based on negligence, effectively mandates that such payments are to be made by the no-fault insurance carrier without regard to fault. *See id.*

Under New York's no-fault statutes, victims of automobile accidents recover directly from their own insurance company up to the amount of $50,000, representing "basic economic loss" which includes: 1) necessary medical and treatment expenses, 2) lost earnings from work based on 80% of lost earnings up to $1,000 per month with a maximum payment of $36,000 over a three year time period, and 3) all other reasonable or necessary expenses incurred, limited to $25 per day for not more than one year from the accident date. *Id.* at § 5102(a).

"First party benefits" are the payments made by the covered person's insurance company to reimburse that person for basic economic loss on account of personal injury arising out of the use or operation of the motor vehicle less: 1) 20% of lost earnings, and 2) amounts recovered or recoverable on account of the injury under state or federal laws providing social security, disability benefits, workers' compensation, or medicare payments (with exceptions to medicare), and 3) amounts deductible under the applicable insurance policy. *Id.* at § 5102(b) (i.e., covered person has $500 deductible, and after she pays first $500, then insurer starts to pay).

There are two limitations on tort recovery for personal injuries which are applicable only to actions for covered persons. *Id.* at §§ 5102(c), (d). First, there is no duplicate tort compensation for basic economic loss, because recoveries in third-party tort actions are for economic losses above basic economic losses. *Id.* Second, damages for non-economic losses (pain and suffering) are not recoverable in tort unless the plaintiff can establish that he or she has suffered a serious injury, i.e. a "personal injury which results in death, dismemberment, a significant disfigurement, a fracture, loss of a fetus, [or the] permanent loss [or limitation] of use of a body organ, member, function or system. . . ." *Id. See also* Naso v. Lafata, 4 N.Y.2d 585, 589, 152 N.E.2d 59, 62, 176 N.Y.S.2d 622, 625 (1958) (under WCL § 29(6), workers' compensation is exclusive remedy when employee is injured by negligence of co-employee); *Grello*, 58 App. Div. 2d at 414, 397 N.Y.S.2d at 398 (Governor Rockefeller, upon approval of New York's no-fault law, stated that it "assures that every auto accident victim will be compensated for substantially all of his economic loss, promptly and without regard to fault.") (quoting N.Y. Legis. Ann., 1973, at 298). WCL is designed to shift risk of loss of earning capacity caused by industrial accidents to industry, and ultimately, the consumer, regardless of fault. *Id. See, e.g.*, 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 2.00 (1990) (workers' compensation has different test of liability than torts - work connection rather than fault); *New York Adopts No-Fault, supra* note 2, at 668 (no-fault recovery is obtained without negligence suit).

can simultaneously[6] receive workers' compensation payments[7] and no-fault payments,[8] which both compensate for basic economic losses.[9] This fundamental purpose to compensate, however, was subverted by conflicting provisions of the statutes.[10] Workers'

[6] *See* Ryder Truck Lines, Inc. v. Maiorano, 44 N.Y.2d 364, 372, 376 N.E.2d 1311, 1316, 405 N.Y.S.2d 666, 671 (1978). In *Ryder*, the court held that "the benefits under [no-fault and workers' compensation] are at present independently available, except as expressly otherwise provided in section [5102(b)] of the Insurance Law." *Id. See also In re* Allstate Ins. Co., 81 App. Div. 2d 665, 666, 438 N.Y.S.2d 356, 357 (2d Dep't 1981) (employee injured in automobile accident during course of employment is entitled to benefits under both no-fault and workers' compensation); Carriers Ins. Co. v. Burakowski, 93 Misc. 2d 100, 102, 402 N.Y.S.2d 333, 334 (Sup. Ct. Erie County 1978) (workers' compensation benefits are deduction from, not bar to no-fault benefits such that employee injured in automobile related accident in course of employment is entitled to reimbursement of lost wages under no-fault notwithstanding fact that she received workers' compensation benefits).

[7] N.Y. WORK. COMP. LAW § 15 (McKinney 1965 & Supp. 1990). *See supra* note 5 (explaining workers' compensation statutory scheme).

[8] N.Y. INS. LAW § 5102(b)(2) (McKinney 1985 & Supp. 1990). *See supra* note 5 (explaining no-fault statutory scheme).

[9] N.Y. INS. LAW § 5102(a) (McKinney 1985 & Supp. 1990). No-fault payments consistently have been held to be equivalent to lost earnings. *See* Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 458, 403 N.E.2d 159, 163, 426 N.Y.S.2d 454, 458 (1980) (§ 5102(a)(2) contemplates recovery for loss of earnings up to $1000 per month); State Farm Mut. Auto. Ins. Co. v. Brooks, 78 App. Div. 2d 456, 459, 435 N.Y.S.2d 419, 422 (4th Dep't 1981) (purpose of § 5102 was to compensate accident victims for earnings they would have realized); Karmilowicz v. Allstate Ins. Co., 77 App. Div. 2d 131, 135, 432 N.Y.S.2d 698, 700 (1st Dep't 1980) (purpose of first-party benefits provision is to prevent loss of earnings). Additionally, workers' compensation payments are equivalent to lost earnings. *See supra* note 5 (explaining no-fault statutory scheme); *infra* notes 55-57 and accompanying text (discussing WCL payments' relation to lost earnings).

[10] *Compare* N.Y. WORK. COMP. LAW § 29(1) (McKinney 1965 & Supp. 1990) *with* N.Y. INS. LAW § 5102(b)(2) (McKinney 1985 & Supp. 1990). N.Y. WORK. COMP. LAW § 29(1) states in pertinent part:

> 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 . . . [t]ake 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 . . . [i]n 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 . . . .

Id. It should be noted that the very nature of the workers' compensation system itself can subvert the law's purposes. Under the WCL, employees relinquish their common law remedy against employers and accept lower benefit levels along with greater assurances of recovery. *See* Note, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181, 181 (1983). Employers give up their common law defenses, such as contributory negligence and assumption of risk, but are protected from unlimited liability. *See* Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 551 (1986).

Although Workers' Compensation was designed to help workers and to promote a safe and injury free environment, it does have its drawbacks. *See* Ford, *Who Will Compensate the*

compensation carriers were granted a lien on "any recovery"[11] received by injured workers in third-party tort actions[12] and, simul-

Victims of Asbestos — Related Diseases? Manville's Chapter 11 Fuels the Fire, 14 ENVTL. L. 465, 469 (1984). First, workers' compensation hearings can go on for years and, as a result, the system is overburdened. *Id.* Second, the injured employees often receive low payments and hence bear some of the costs of the system. *See* Royce & Callahan, *Isocyanates: An Emerging Toxic Tort*, 18 ENVTL. L. 293, 305 (1988). Consequently, the pressure on employers to maintain a safe and injury free environment may be lessened. *See* Note, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety*, 52 BROOKLYN L. REV. 183, 193 (1986). Finally, litigation has not been entirely eliminated by the workers' compensation system. *See* Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857, 868-69 (1985).

See N.Y. INS. LAW § 5102(b)(2) (McKinney 1985 & Supp. 1990) (allowing no-fault carriers to deduct payments made by workers' compensation carriers). *See also* Granger v. Urda, 44 N.Y.2d 91, 99, 375 N.E.2d 380, 383, 404 N.Y.S.2d 319, 322 (1978) (coordination of no-fault and workers' compensation poses problems not contemplated by legislature); Fellner v. Country Wide Ins., 95 App. Div. 2d 106, 108, 466 N.Y.S.2d 766, 768 (3d Dep't 1983) (having left § 29(1) lien unchanged by legislature after adoption of no-fault, harsh result occurred); State Farm Mut. Auto. Ins. Co. v. Brooks, 101 Misc. 2d 704, 710, 421 N.Y.S.2d 1010, 1014 (Sup. Ct. Monroe County 1979) (specific statutory deductions from no-fault benefits not intended to reduce claimant's payment below actual economic loss), *rev'd on other grounds*, 78 App. Div. 2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981).

[11] N.Y. WORK. COMP. LAW § 29(1) (McKinney 1965 & Supp. 1990).

[12] *Id., construed in Fellner*, 95 App. Div. 2d at 107, 466 N.Y.S.2d at 767 (when employee elects to sue third-party for damages, workers' compensation carrier has lien on proceeds of any recovery that encompasses compensation).

The purpose of § 29(1) in WCL was to avoid "double recovery by the claimant for the same predicate injury by permitting the compensation carrier to recoup its compensation . . . payments from the third-party tort-feasor by means of its section 29 lien on the claimant's recovery in the third-party action . . . ." *Granger*, 44 N.Y.2d at 97-98, 375 N.E.2d at 382, 404 N.Y.S.2d at 321 (citations omitted). *See* Grello v. Daszykowski, 58 App. Div. 2d 412, 414, 397 N.Y.S.2d 396, 398 (2d Dep't 1977), *rev'd on other grounds*, 44 N.Y.2d 894, 379 N.E.2d 161, 407 N.Y.S.2d 633 (1978). The court noted that "a claimant's recovery in a third-party action acknowledged the fact that third-party actions based on fault were intended to compensate an injured party for his entire loss—both economic and noneconomic." *Id.*

The statutory lien protected the workers' compensation carrier from having to pay economic losses which the injured employee recovered from the negligent third-party. *See id.* (equitable for compensation carrier to have lien, otherwise injured party would receive double recovery); Amo v. Empsall-Clark Co., 9 App. Div. 2d 852, 853, 193 N.Y.S.2d 154, 157 (3d Dep't 1959) (primary purpose of compensation deduction is prevention of double recovery to detriment of one who already made payment); Berenberg v. Park Memorial Chapel, 286 App. Div. 167, 170, 142 N.Y.S.2d 345, 348 (3d Dep't 1955) (purpose of regulating third-party claims was prevention of double recovery by injured workers and reimbursement to insurance carrier); Cardillo v. Long Island College Hosp., 86 Misc. 2d 438, 440, 382 N.Y.S.2d 642, 643 (Sup. Ct. Kings County 1976) (statutory lien favoring workers' compensation carrier regarding third-party recovery was meant to prevent double recovery); Note, *Work. Comp. Law §29(1): Balancing the Equities in the Apportionment of Workers' Compensation Litigation Costs—New York Adopts the Total Benefit Doctrine*, 58 ST. JOHN'S L. REV. 676, 677 (1984) [hereinafter *Balancing the equities*] (employer or compensation carrier is granted lien to prevent double recovery).

taneously, automobile insurance carriers were permitted to deduct the amount of workers' compensation payments from no-fault "first party benefits."[13] In sum, the no-fault statute provided that the no-fault carrier did not have to pay to the insured first-party benefits to the extent that a workers' compensation award was "recovered or recoverable."[14] In addition, it denied an insured the opportunity to sue a third-party for basic economic losses.[15] This result, coupled with a failure to limit the workers' compensation carriers' absolute lien, produced a "double debit,"[16] whereby the injured worker became a self-insurer for her basic economic losses comprising first-party benefits not paid due to the double offset.[17] This, in turn, left the injured worker with less than what a jury had found was necessary to make her economically whole.[18]

In an attempt to remedy this problem, subdivision 1-a of section

[13] N.Y. INS. LAW § 5102(b) (McKinney 1985 & Supp. 1990).

[14] *Id.* at § 5102(b)(2).

[15] *See supra* note 5 (quoting N.Y. INS. LAW § 5104(a) (McKinney 1985 & Supp. 1990)).

[16] Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 252, 556 N.E.2d 1108, 1110, 557 N.Y.S.2d 301, 303 (1990).

[17] Granger v. Urda, 44 N.Y.2d 91, 99, 375 N.E.2d 380, 383, 404 N.Y.S.2d 319, 322 (1978). In *Granger*, the court concluded in pertinent part:

> Thus, if both statutes are read literally a harsh, unintended result obtains. The no-fault scheme provides that the no-fault carrier need not pay its insured first-party benefits to the extent that a workmen's compensation award is recovered or recoverable, while section 29 of the Workmen's Compensation Law, by failing to limit the applicability of the compensation carrier's lien on any recovery by a compensation claimant in a third-party action, results in converting the injured employee into a self-insurer for at least a portion of his basic economic loss. Manifestly, corrective legislative action is advisable, if not imperative.

Id. (citations omitted). *See, e.g.*, Vinson v. Berkowitz, 83 App. Div. 2d 531, 532, 441 N.Y.S.2d 460, 462 (1st Dep't 1981) (lien asserted by compensation carrier actually comes out of injured employee's pocket); Grello v. Daszykowski, 58 App. Div. 2d 412, 428, 397 N.Y.S.2d 396, 407 (2d Dep't 1977) (shifting burden of basic economic losses onto victim would be contrary to legislative intent and purpose of no-fault statute), *rev'd on other grounds*, 44 N.Y.2d 894, 379 N.E.2d 161, 407 N.Y.S.2d 633 (1978). Cederman v. Liberty Mut. Ins. Co., 58 App. Div. 2d 969, 970, 397 N.Y.S.2d 252, 253 (4th Dep't 1977) (§ 29(1) caused injured covered person to "pay out of his permanent injury and pain and suffering recovery his own first party benefits which presumably he has paid for in the first instance by virtue of the insurance premium"); DiFede, *supra* note 2, at 344 (claimant made self-insurer if he cannot recover basic economic loss from third-party and workers' compensation has lien on compensation awarded).

[18] *See* Granger v. Urda, 54 App. Div. 2d 377, 380, 388 N.Y.S.2d 936, 938 (3d Dep't 1976), *rev'd on other grounds*, 44 N.Y.2d 91, 375 N.E.2d 380, 404 N.Y.S.2d 319 (1978). In *Granger*, the appellate division asserted that it is unfair to deprive the injured party from being made whole, as determined by a jury, and § 29(1) liens should not attach to third-party recoveries because such recoveries equal damages which a workers' compensation carrier never paid to a claimant. *Id.*

29 of the WCL[19] was enacted to bar workers' compensation carriers from obtaining a lien for compensation payments which were "in lieu of first-party benefits."[20] Notwithstanding the enactment of WCL section 29(1-a), it remained unclear whether workers' compensation payments for permanent partial disability[21] and serious facial disfigurement[22] constituted basic economic loss and,

[19] N.Y. WORK. COMP. LAW § 29(1-a) (McKinney 1965 & Supp. 1990). Section 29(1-a) states in pertinent part:

> 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 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.

Id.

[20] *Id. See* Fellner v. County Wide Ins., 95 App. Div. 2d 106, 108, 466 N.Y.S.2d 766, 768 (3d Dep't 1983). *See also* GOVERNOR'S BILL JACKET, L.1978, ch.572, ASSEMBLY MEMORANDUM, A. 12492, (1978). The Bill Jacket indicates that the general purpose of the bill to amend § 29(1) was to ameliorate the problem recognized by the court of appeals in *Granger. Id.* Furthermore, the legislature, the Insurance Department and the original sponsors of the no-fault law intended that no-fault victims not be subjected to a double offset. *Id. See generally* Schacher, *Third Party Action v. Carrier's Compensation — Lien and Offset,* 36 BROOKLYN BAR. 138, 140 (1985) (principal basis for amendment of § 29(1) was fact that carriers were permitted to benefit at claimant's expense).

[21] N.Y. WORK. COMP. LAW § 15(3) (McKinney 1965 & Supp. 1990). The statute defines permanent partial disability as a "disability partial in character but permanent in quality [where] the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in this subdivision . . . ." *Id.* The salary is multiplied by a percentage determined by the board and this figure is multiplied by the weeks of lost earnings the injured worker has sustained. *Id.* It should be noted that each type of injury which results in lost earnings has a predetermined maximum number of weeks fixed by the statute. *Id.*

[22] *Id.* at § 15(3)(t). The statute states in pertinent part:

> Disfigurement.
>
> 1) The board may award proper and equitable compensation for serious facial or head disfigurement, not to exceed ten thousand dollars, including a disfigurement continuous in length which is partially in the facial area and also extends into the neck region as described in paragraph two hereof.
>
> 2) The board, if in its opinion the earning capacity of an employee has been or may in the future be impaired, may award compensation for any serious disfigurement in the region above the sterno clavicular articulations anterior to and including the region of the sterno cleido mastoid muscles on either side, but no award under subdivisions one and two shall, in the aggregate, exceed ten thousand dollars.
>
> 3) Notwithstanding any other provision hereof, two or more serious disfigurements, not continuous in length, resulting from the same injury, if partially in the facial area and partially in the neck region as described in paragraph two hereof, shall be deemed to be a facial disfigurement.

Id.

consequently, whether a recovery for such injuries was in lieu of first-party benefits.[23] Recently, in *Dietrick v. Kemper Insurance Co.*,[24] the New York Court of Appeals held that workers' compensation payments for permanent partial disability and serious facial disfigurement are in lieu of first-party benefits and, therefore, workers' compensation carriers do not possess liens for such payments against recoveries awarded in third-party tort actions.[25]

In *Dietrick*, the plaintiff suffered fractures to her collarbone, ribs and feet and a severe laceration of her forehead in an automobile accident with another motorist during the course of her employment.[26] Pursuant to a decision of the Workers' Compensation Board,[27] defendant, the workers' compensation carrier of plaintiff's employer, paid the plaintiff for medical expenses, temporary total disability,[28] permanent partial disability[29] and serious facial disfigurement.[30] In addition, the plaintiff brought a negligence action against the other motorist,[31] and settled with the other mo-

[23] *See* Dietrick v. Kemper Ins. Co., 145 App. Div. 2d 8, 10-11, 537 N.Y.S. 2d 372, 373 (4th Dep't 1989), *rev'd on other grounds*, 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990). At the appellate level, Judge Green observed that only one state court has addressed the issue of whether or not workers' compensation payments for serious facial disfigurement and permanent partial disability constitute first-party benefits. *Id.* (citing Kupiec v. Christensen, 118 Misc. 2d 716, 461 N.Y.S.2d 175 (Sup. Ct. Oneida County 1983)). In *Kupiec*, the court held that workers' compensation carriers are not entitled to liens for awards made to injured workers which constituted loss of earnings and medical expenses, but were entitled to liens for awards paid for permanent partial disability and serious facial disfigurement. *Kupiec*, 118 Misc. 2d at 718, 461 N.Y.S.2d at 176.

[24] 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990).

[25] *Id.* at 254, 556 N.E.2d at 1112, 557 N.Y.S.2d at 305.

[26] *Id.* at 250, 556 N.E.2d at 1109, 557 N.Y.S.2d at 302.

[27] *Id. See* N.Y. WORK. COMP. LAW §§ 20, 23 (McKinney 1965 & Supp. 1990). Pursuant to the cited provisions, once a claim for compensation arises, the workers' compensation board shall consider all the relevant factors and make a final determination of payment. *Id.* Additionally, if the claimant requests a review of the award it may be reviewed by the Board and appealed to the appellate division. *Id. See also* New York Cent. R.R. v. White, 243 U.S. 188, 194 (1917). Workers' compensation commission's award is subject to appeal on questions of law to the appellate division. *Id.*

[28] Dietrick v. Kemper Ins. Co, 76 N.Y.2d 248, 250, 556 N.E.2d 1108, 1109, 557 N.Y.S.2d 301, 302 (1990).

[29] *Id.*

[30] *Id.* Defendant paid benefits to plaintiff in the following amounts: medical expenses $12,647.50, temporary total disability $3,150.27, permanent partial disability $11,460.75 (consisting of schedule loss awards), and serious facial disfigurement $5,000. *Id.*

[31] *Id. See* N.Y. INS. LAW § 5104(a) (McKinney 1985 & Supp. 1990). Pursuant to § 5104(a), a seriously injured motorist can bring a suit in negligence against the other motorist, but despite the ability to plead both economic and non-economic losses, he can only

torist's insurance carrier.[32] The defendant claimed a lien[33] against the settlement amount to recover payments which it had made to the plaintiff for permanent partial disability and serious facial disfigurement.[34] The plaintiff subsequently brought an action against the defendant to remove the lien, claiming those payments constituted first-party benefits upon which no lien could exist.[35]

The trial court granted the plaintiff's motion for summary judgment, declaring that the defendant did not have a valid lien on the proceeds of a third-party action to recover payments made to the plaintiff by the defendant for permanent partial disability and serious facial disfigurement.[36] On appeal, the appellate division reversed holding that payments for permanent partial disability and serious facial disfigurement were more similar to compensation for pain and suffering.[37] Reversing the appellate division and reinstating the judgment of the trial court, the court of appeals held that the workers' compensation carrier did not have a valid lien under the WCL section 29(1-a).[38] The court stated that, pursuant to the legislative intent behind this amendment, benefits paid to the plaintiff for permanent partial disability and serious facial disfigurement are qualitatively similar to, and therefore, in lieu of first-party benefits.[39] The court further concluded that payments for permanent partial disability and serious facial disfigurement are tantamount to compensation for lost earnings because individuals suffering from such injuries will experience a loss of immediate or future earning power.[40]

collect non-economic losses from the negligent motorist. *Id.*

[33] Dietrick v. Kemper Ins. Co., 145 App. Div. 2d 8, 9-10, 537 N.Y.S.2d 372, 373 (4th Dep't 1989), *rev'd on other grounds*, 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990). Even though the settlement between the other motorist and its insurance carrier was only for the policy limit of $10,000, the defendant claimed a lien for $16,460.75 because it believed that plaintiff had retained counsel to recover additional funds in excess of the policy limits. *Id.*

[34] Dietrick v. Kemper Ins. Co., 76 N.Y.2d at 250, 556 N.E.2d at 1109, 557 N.Y.S.2d at 302. *See* N.Y. WORK. COMP. LAW § 29(1-a) (McKinney 1965 & Supp. 1990).

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

[36] *Dietrick*, 145 App. Div. 2d at 10, 537 N.Y.S.2d at 373.

[37] *Id.*

[38] *Id.*

[39] *Dietrick*, 76 N.Y.2d at 252, 556 N.E.2d at 1110, 557 N.Y.S.2d at 303.

[40] *Id.*

[41] *See id.* (quoting Sweeting v. American Knife Co., 226 N.Y. 199, 201, 123 N.E. 82, 83, *aff'd*, 250 U.S. 596 (1919)) (serious facial disfigurement has tendency to impair earning

Writing for the court, Judge Bellacosa discussed the integration of the no-fault and workers' compensation laws, and how this dual statutory scheme interacted to produce detrimental results to workers injured in automobile accidents.[41] Acknowledging that the legislature, when it passed section 29(1-a), was trying to rectify these seemingly incompatible provisions of the WCL and no-fault,[42] the court concluded that since both statutes seek to compensate for lost earnings, workers' compensation awards should be deemed equivalent to first-party benefits.[43] Judge Bellacosa reasoned that if the legislature did not intend to treat all workers' compensation awards as equivalent to first-party benefits, it would have specifically delineated those types of awards that were not to receive such treatment.[44] The court further stated that classifying awards for permanent partial disability and serious facial disfigurement as damages instead of first-party benefits would be contrary to the whole theory behind workers' compensation awards: the reimbursement of employees for lost wages resulting from work related injuries.[45]

The dissent argued for the affirmance of the appellate division, reasoning that the nature and character of payments for perma-

power of its victims). *See also* New York Cent. R.R. v. Bianc, 250 U.S. 596, 601 (1919) (serious disfigurement of face or head may have direct correlation to injured persons earning capacity); Marhoffer v. Marhoffer, 220 N.Y. 543, 548, 116 N.E. 379, 380 (1917) (any loss of physical function can potentially detract from injured's earning capacity); Wilkosz v. Symington Gould Corp., 14 App. Div. 2d 408, 410, 221 N.Y.S.2d 209, 211 (3d Dep't 1961) ("[m]oreover, in this State and in the Federal courts, it has been consistently held that the purpose of a schedule award is to compensate the employee for immediate or prospective loss of earnings or earning capacity"), *aff'd mem.*, 14 N.Y.2d 739, 199 N.E.2d 387, 250 N.Y.S.2d 297 (1964); Beekman v. New York Evening Journal, Inc., 258 App. Div. 833, 833, 15 N.Y.S.2d 671, 672 (3d Dep't 1939) (loss of earning power should be basis of award for disfigurement) (citing Sweeting v. American Knife Co., 226 N.Y. at 201, 123 N.E. at 83)). *But see* Clark v. Hayes, 207 App. Div. 560, 562, 202 N.Y.S. 453, 455 (3d Dep't 1924) (weight of authority and statutory construction indicate award for disfigurement cannot be made in addition to permanent total disability), *aff'd mem.*, 238 N.Y. 553, 144 N.E. 888 (1924).

[41] *See Dietrick*, 76 N.Y.2d at 252, 556 N.E.2d at 1111, 557 N.Y.S.2d at 303.

[42] *Id. See In re* Butler, N.Y.L.J. at 1, col 1, Nov. 22, 1977 (Sup. Ct., Bronx County) (no-fault and workers' compensation are not in harmony on lien issue, so workers' compensation lien should be vacated); Schreier, *supra* note 4, at 46 (no-fault statute and WCL statute are not in harmony on lien issue).

[43] *See Dietrick*, 76 N.Y.2d at 252, 556 N.E.2d at 1111, 557 N.Y.S.2d at 303.

[44] *See id.* at 253, 556 N.E.2d at 1111, 557 N.Y.S.2d at 304.

[45] *See id. See also infra* note 55 and accompanying text (analyzing theory of WCL).

nent partial disability and serious facial disfigurement[46] are "more akin to compensation for a claimant's pain and suffering and are not first-party benefits for basic economic loss."[47] In addition, the dissent took the position that the express language of section 29(1-a) indicates the legislature's clear intention that certain payments made by workers' compensation carriers should not constitute first-party benefits.[48]

This Comment will address how the New York Court of Appeals correctly equated payments for permanent partial disability and serious facial disfigurement with first-party benefits under no-fault. It will explore the legislative policies underlying the creation of the WCL as well as those modifications of the WCL which were enacted to integrate both statutory schemes. In addition, this Comment will assert that the correct interpretation of lost earnings, as defined within no-fault, was expanded to equate workers' compensation benefits with first-party benefits. Finally, this Comment will draw a legislative proposal in an attempt to clarify the statutory schemes so as to eliminate future controversy over the status of workers' compensation payments.

I. Lost Earnings and First-Party Benefits

A. *Legislative Intent and Lost Earnings*

At common law, when an employee was injured during the course of employment, she could sue and allege that the employer acted negligently.[49] The damages recovered, if any, would com-

[46] *Dietrick*, 76 N.Y.2d at 254-55, 556 N.E.2d at 1112, 557 N.Y.S.2d at 305.

[47] Dietrick v. Kemper Ins. Co., 145 App. Div. 2d 8, 11, 537 N.Y.S.2d 372, 373 (4th Dep't 1989), *rev'd on other grounds*, 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990).

[48] *Dietrick*, 76 N.Y.2d at 254-55, 556 N.E.2d at 1112, 557 N.Y.S.2d at 305. *See also supra* note 19 (language of § 29(1-a)).

[49] *See* D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts, § 80, at 568-69 (5th ed. 1984). At common law, the extent of employer liability was very limited. *Id.* The common law theory of economics was that since the supply of work was unlimited and the worker was under no obligation to enter into employment, the employee was expected to accept all risks of the trade. *Id.* This left the employer with only a minimal obligation of exercising reasonable care. *Id.* Numerous industrial accidents without any recovery resulted because lack of care could not be proven, or the worker was held to have assumed the risk. *Id.*

pensate the employee for lost earnings and pain and suffering.[50]

The WCL supplanted the common law, whereby the legislature enacted a system guaranteeing compensation for lost earnings regardless of fault.[51] Since fault was no longer the basis upon which a worker was compensated for injuries, recoveries for pain and suffering were placed beyond the scope of the WCL.[52] Instead, pain and suffering became "part of the risks of the employment" as well as "part of [the] risks of the insurance."[53]

[50] *See* D. DOBBS, REMEDIES, DAMAGES — EQUITY — RESTITUTION, § 8.1, at 540 (1973). Personal injury actions at common law comprise recoveries for lost earning capacity, medical expenses and pain and suffering. *Id.* Plaintiffs usually attempt to prove past and future damages for each type of loss. *Id.* Although personal injury awards comprise lump-sum payments, workers' compensation awards represent weekly or monthly distributions of benefits. *Id.*

[51] *See* D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS, § 80, at 572-73. Statutory changes were being made throughout the country because of the large number of industrial accidents remaining uncompensated under the common law. *Id. See also* Jensen v. Southern Pac. Co., 215 N.Y. 514, 528, 109 N.E. 600, 604 (1915) (as industrial conditions changed, there was need for more just and economical system of compensation for employees in accidental injuries).

New York was the first state to enact a workers' compensation statute. *See* D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS, § 80, at 572-73. By 1921, the majority of states had enacted such legislation. *Id.* Workers' compensation is a form of strict liability because the employer is held liable for industrial accidents without regard to any negligence. *Id.* Therefore, "the financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer." *Id.*

[52] *See* Sweeting v. American Knife. Co., 226 N.Y. 199, 201, 123 N.E. 82, 83, *aff'd*, 250 U.S. 596 (1919). Originally, under § 29, an injured employee was required to elect either compensation or his common law tort remedy against a negligent third-party. *See* Calhoun v. West End Brewing Co., 269 App. Div. 398, 400, 56 N.Y.S.2d 105, 107 (4th Dep't 1945). In 1937, § 29 was amended to discard the absolute election of remedies, so that the employee could retain compensation and the right to take action against a third-party. *See* GEGAN, *supra* note 4, at 401. *See also* New York Cent. R.R. v. White, 243 U.S. 188, 200 (1915) (WCL sets aside common-law system regarding employer liability for employee injuries); Cifolo v. General Elec. Co., 305 N.Y. 209, 213, 112 N.E.2d 197, 198 (citing N.Y. WORK. COMP. LAW § 1011 (McKinney 1913)) (employer compliance with WCL excludes any other common law remedy), *cert. denied*, 346 U.S. 874 (1953); *Jensen*, 215 N.Y. at 528, 109 N.E. at 604 (state competent to eliminate fault and causes of action for damages in order to establish plan of compensation beneficial to general welfare); Fellner v. Country Wide Ins., 95 App. Div. 2d 106, 107, 466 N.Y.S.2d 766, 767 (3d Dep't 1983) (under § 29(1), an injured employee may elect to sue third-party tort-feasor to pursue his common law remedies); Morris v. Muldoon, 190 App. Div. 689, 692, 180 N.Y.S. 319, 321 (1st Dep't) (if under WCL "there is a separate right of action at common law for the damages sustained thereby, the Workers' Compensation Law would become a farce . . . however, the right to recover for pain and suffering has been surrendered by the employe [sic]"), *aff'd*, 229 N.Y. 611, 129 N.E. 928, 173 N.Y.S. 905 (1920).

[53] *Sweeting*, 226 N.Y. at 201, 123 N.E. at 83. *See also Jensen*, 215 N.Y. at 527-28, 109 N.E. at 603 (at common law, servants assumed ordinary risks of employment, therefore no

It is suggested that the fundamental policy behind the WCL is to guarantee compensation for the inability to work in order to insure that injured workers do not become a burden to society,[54] rather than to award damages for the loss of a body function.[55] Furthermore, unlike recoveries in negligence suits against third-parties which include non-economic loss, workers' compensation benefits are based solely upon economic loss.[56] Therefore, the ap-

unfairness resulted from enactment of WCL which provided limited compensation for accidental injuries, whether or not cause of action could have existed at common law).

[54] *See White*, 243 U.S. at 197. The Court, upon reviewing the constitutionality of the New York WCL, stated:

> In support of the legislation, it is said . . . that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity . . . .

Id.

The Court further discussed the WCL's concern with the prevention of pauperism and its relationship to vice and crime. *Id.* at 207. *See also* 1 A. LARSON, WORKMENS' COMPENSATION LAW, § 2.20 (1990). One of the underlying social philosophies behind workers' compensation is to provide financial benefits to those injured in work related accidents in an efficient manner. *Id.* This policy will relieve the community of such a burden and spread the cost to the consumer of the product. *Id.*

[55] *See* Marhoffer v. Marhoffer, 220 N.Y. 543, 546, 116 N.E. 379, 379 (1917). Judge Pound, writing for the majority, maintained that "[t]he theory of the New York law is not indemnity for loss of a member or physical impairment as such but compensation for disability to work made on the basis of average weekly wages." *Id. See also* Wilkosz v. Symington Gould Corp., 14 App. Div. 2d 408, 410, 221 N.Y.S.2d 209, 211 (3d Dep't 1961) (whole theory of WCL is to compensate for lost wages), *aff'd mem.*, 250 N.Y.2d 247, 199 N.E.2d 387 (1964); *Sweeting*, 226 N.Y. at 204, 123 N.E. at 83 (Pound, J., concurring) (if award for disfigurement is based on impaired ability to get work, no injustice is done to act's purpose); 1 A. LARSON, WORKMEN'S COMPENSATION LAW, § 2.40 (1990) ("In [workers'] compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power").

[56] *See supra* note 55; *infra* note 57 (equating workers' compensation benefits with lost earnings, not damages recovered in third-party tort actions). *See also White*, 243 U.S. at 193. The Court maintained that "[c]ompensation under the [Workmen's Compensation Act] is not regulated by the measure of damages applied in negligence suits, but . . . it is based solely on loss of earning power . . . whether partial or total, temporary or permanent . . . ." *Id. See also Marhoffer*, 220 N.Y. at 547-48, 116 N.E. at 380. Judge Pound, writing for the majority, observed:

> While it may be urged that . . . injuries are recognized by the [workers' compensation] law which do not necessarily impair earning power for any fixed period, such as "serious facial or head disfigurement," . . . [§ 15 of the WCL] . . . refers to . . . compensation in case of disability . . . . [S]o far as compensation is allowed for injuries which do not have any relation to disability for the full period for which such compensation is allowed, such allowances are the anomalies and not the characteristics of the statute. Any loss of physical function detracts potentially from earning power, and the legislature is, therefore, justified in establishing a fixed period of compensation based on a specific injury, such as the loss of a finger. If the injury

pellate division's assertion in *Dietrick* that some workers' compensation payments are non-economic in nature is incompatible with the theory behind the WCL, namely to compensate an injured worker for lost earnings.[57]

The legislature's intent to view workers' compensation as compensation for economic loss is further illustrated by the enactment of section 29(1) of the WCL.[58] This provision gives an injured victim the right to bring a cause of action against a negligent third-party.[59] The rationale was to place the responsibility of damages upon the negligent third-party[60] and to maintain workers' compensation payments as coverage for economic losses only.[61] In ad-

> detracts more or less from the earning power than the period fixed by the statute, it may at least be said that the rule is simple and the scale of compensation definite.

Id. See also Sweeting, 226 N.Y. at 204, 123 N.E. at 84. Concurring, Judge Pound stated that an extension of the theory of the WCL beyond the scope of impairment of earning power, whereby an assessment of damages would be permitted, would introduce a new and difficult problem "as to the limits of legislative power . . . and the reasonableness of the burden." *Id.*

[57] *See* Winfield v. New York Cent. & Hudson River R.R., 216 N.Y. 284, 289, 110 N.E. 614, 616 (1915) (compensation awarded to employee is representative of economic loss and not like benefits received under rules of damages founded upon negligence), *rev'd on other grounds*, 244 U.S. 147 (1917). *See also* Wilkosz v. Symington Gould Corp., 14 App. Div. 2d 408, 409-10, 221 N.Y.S.2d 209, 210-11 (3d Dep't 1961) (relying upon basic premise behind WCL to state that there is no legal justification for theory that permanent partial disability awards are not based on loss of earnings), *aff'd*, 14 N.Y.2d 739, 199 N.E.2d 387, 250 N.Y.S.2d 297 (1964); Appellant's Brief, *supra* note 4, at 9 (incompatible with theory of WCL to permit workers' compensation carriers to assert liens on non-economic loss recoveries).

[58] *See* N.Y. WORK. COMP. LAW § 29(1) (McKinney 1965 & Supp. 1990). *See also* Mazarredo v. Levine, 274 App. Div. 122, 125, 80 N.Y.S.2d 237, 240 (1st Dep't 1948) (apparent that under § 29(1) employer is immune from suit for damages); Lester v. Otis Elevator Co., 169 App. Div. 613, 617, 155 N.Y.S. 524, 526-27 (1st Dep't 1915) (§ 29(1) relates only to rights and remedies between employer and employee, but nowhere in provision is there any attempt to alter remedies of employee against third-parties for damages).

[59] N.Y. WORK. COMP. LAW § 29(1) (McKinney 1965 & Supp. 1990).

[60] *See* Schacher, *supra* note 20, at 138 (under § 29, injured employee retains common law right to recover damages from third-party action). *See generally* Woodward v. E. W. Conklin & Son, 171 App. Div. 736, 739, 157 N.Y.S. 948, 950 (3d Dep't 1916) (primary purpose of allowing employee to sue negligent third-party was to protect employee against own ignorance in collecting claim for injuries); Application of Matzner, 96 Misc. 2d 198, 201, 408 N.Y.S.2d 762, 765 (Sup. Ct. Queens County 1978) (purpose of § 29(1) is to protect injured worker, not carrier). Workers' compensation guarantees employees benefits based upon calculated wages and relieves employers from uncertain tort liability. *Balancing the Equities, supra* note 12, at 681. "When accidents occur, however, the statutory benefits are meager and the rules strict. Public policy, therefore, is advanced by permitting, and indeed encouraging, suits against negligent third parties to enable the employee to obtain a recovery greater than the subsistence amounts provided by statute." *Id.* at 681-82.

[61] *See* Granger v. Urda, 44 N.Y.2d 91, 97, 375 N.E.2d 380, 382, 404 N.Y.S.2d 319, 321

dition, section 29(1) gave workers' compensation carriers an absolute lien on recoveries that workers obtained in third-party tort actions.[62] In *Granger v. Urda*,[63] the New York Court of Appeals recognized that one of the considerations behind the creation of the absolute lien under section 29(1) consisted of reducing the cost of supplying workers' compensation insurance in order to achieve the beneficial societal goal of creating a "workable system of compensation,"[64] which would ensure that injured workers would not become a burden to society. Nonetheless, the cost-saving goal behind the section 29(1) lien was extended too far and the interaction between no-fault and the WCL created a double debit for the injured worker.[65] This "harsh, unintended result"[66] was minimized in *Grello v. Daszykowski*.[67]

In *Grello*, the court held that the no-fault offset for monies paid by workers' compensation carriers was revoked once a lien against a third-party recovery in a work-related automobile accident was

(1978). In *Granger*, the court, referring to third-party actions under workers' compensation, stated:

> Where a compensation claimant is injured due to the fault of one not a fellow employee, the Legislature has provided a means whereby the claimant may recover damages to compensate him for the full extent of his injuries, a remedy not otherwise available within the compensation system, by permitting him to prosecute a third-party action against the party actually responsible for those injuries.

Id.

[62] *See* N.Y. WORK. COMP. LAW § 29(1) (McKinney 1965 & Supp. 1990).

[63] 44 N.Y.2d 91, 375 N.E.2d 380, 404 N.Y.S.2d 319 (1978).

[64] *Id.* at 97, 375 N.E.2d at 382, 404 N.Y.S.2d at 321. In *Granger*, the court elaborated on the history of the WCL as follows:

> It was also recognized, . . . that although funded primarily by means of employer contributions, measures had to be taken which would ensure that the cost of providing this protection to injured employees did not escalate to the point of economic impracticality. That this cost factor is of manifest concern to the Legislature is evinced by section 18 of article I of the Constitution of the State which provides that compensation payments "shall be held to be a proper charge in the cost of operating the business of the employer." Moreover, in realizing that a workable system of compensation could not totally redress an injured employee's injuries and remain a financially viable institution at the same time, a decision was reached whereby a limitation was placed on the amount of benefits recoverable by a compensation claimant.

Id. (citations omitted). *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION LAW, § 2.70 (1990) (compensation should not hurt employer as it helps workers because cost of system is spread among consumers through higher cost of products).

[65] *See supra* notes 54 and 64 (explaining goal of WCL to provide limited compensation to injured workers and spread cost to society).

[66] Granger v. Urda, 44 N.Y.2d 91, 99, 375 N.E.2d 380, 383, 404 N.Y.S.2d 319, 322 (1978).

[67] 44 N.Y.2d 894, 379 N.E.2d 161, 407 N.Y.S.2d 633 (1978).

executed.[68] The practical effect of this ruling was that, due to the execution of the liens by compensation carriers, the no-fault carrier had to bear the loss[69] and reimburse claimants for first-party benefits that were previously withheld under the offset provision.[70] After these two court of appeals decisions, the New York legislature enacted section 29(1-a) and limited the scope of the section 29(1) lien.[71] The issue then arose as to whether all payments under the WCL were equivalent to first-party benefits and, therefore, compensation within the definition of basic economic loss.[72] It is suggested that the enactment of section 29(1-a) better integrated the two statutory schemes and accomplished two basic results.

First, the burden of compensating workers injured in work related automobile accidents for first-party benefits was effectively shifted to the workers' compensation carriers.[73] It is submitted

[68] *See Grello*, 44 N.Y.2d at 896, 379 N.E.2d at 162, 407 N.Y.S.2d at 634. *See also* Mora v. Ortiz, 75 App. Div. 2d 563, 564, 427 N.Y.S.2d 415, 417 (1st Dep't 1980) (court cites *Grello* as standing for proposition that no-fault carrier must bear loss if compensation carrier executes lien because offset is no longer equivalent to amounts recovered or recoverable under WCL); Orth v. Coffey, 70 App. Div. 2d 614, 614-15, 416 N.Y.S.2d 324, 324-25 (2d Dep't 1970) (Prior to enactment of § 29(1-a), *Grello* stood for proposition that "compensation carrier's 'absolute lien' [was] not affected by the fact that the no-fault carrier must reimburse the injured party to the extent of the lien recovered by the workers' compensation carrier . . . .").

[69] Grello v. Daszykowski, 44 N.Y.2d 894, 895, 379 N.E.2d 161, 162, 404 N.Y.S.2d 633, 634 (1978).

[70] *See Mora*, 75 App. Div. 2d at 564, 427 N.Y.S.2d at 417 (under § 29(1), workers' compensation carrier may attach lien on proceeds of third-party settlement; worker can then proceed against no-fault insurer for first-party benefits for amount settlement was depleted); *Orth*, 70 App. Div. 2d at 614-15, 416 N.Y.S.2d at 324-25 (absolute lien of workers' compensation not affected by no-fault carrier's reimbursement for amount recouped by workers' compensation lien).

[71] *See* Granger v. Urda, 44 N.Y.2d 91, 375 N.E.2d 380, 404 N.Y.S.2d 319 (1978) (decided March 28, 1978); Grello v. Daszykowski, 44 N.Y.2d 894, 379 N.E.2d 161, 404 N.Y.S.2d 633 (1978) (decided June 6, 1978). Section 29 of the WCL was subsequently amended by the addition of § 29(1-a) in August of 1978. *See* N.Y. Work. Comp. Law §§ 29(1) & (1-a) (McKinney 1965 & Supp. 1990); Governor's Bill Jacket, Senate Report S. 10275-B *passim* (1978).

[72] *See Granger*, 44 N.Y.2d at 98, 375 N.E. at 382, 404 N.Y.S.2d at 322. The court noted that "events not foreseen at the time section 29 was enacted in 1937, have injected an air of uncertainty into an otherwise smoothly operating procedure." *Id. See also*, Schreier, *supra* note 4, at 8. Since the enactment of no-fault in 1974, the compelling question is whether a workers' compensation carrier has any lien on the proceeds of an automobile case, and to what extent. *Id.*

[73] *See* Grello v. Daszykowski, 58 App. Div. 2d 412, 415, 397 N.Y.S.2d 396, 398 (2d Dep't 1977), *rev'd on other grounds*, 44 N.Y.2d 894, 379 N.E.2d 161, 407 N.Y.S.2d 633

that shifting the cost burden reflects a fundamental change in the political landscape whereby the legislature is no longer focused on the previous policy of reducing costs to the workers' compensation system at the expense of the workers.[74] Therefore, unlike the legislature's original concern with the financial viability of the workers' compensation system when the WCL was first enacted,[75] the legislature must have felt that the workers' compensation system was strong enough to bear the additional costs of fully compensating injured workers to make them whole.[76] It is also suggested that when the legislature made workers' compensation carriers primarily responsible for first-party benefits, it intended workers' compensation awards to cover the same losses as no-fault

(1978). The court stated that Insurance Law § 671(2) (now § 5102(b)) allowed no-fault carriers to deduct amounts recovered or recoverable from workers' compensation. *Id.* Subsequently, the legislature made workers' compensation carriers the primary carrier for basic economic loss. *Id.* Therefore, under the terms of § 29(1-a), workers injured in work-related automobile accidents may not elect between either the workers' compensation or no-fault carrier as to which will compensate for basic economic loss. *Id.* In *Carlo Service Corp. v. Rachmani*, 64 App. Div. 2d 579, 579, 407 N.Y.S.2d 700, 701 (1st Dep't 1978), the claimant was injured in the course of employment as a taxicab driver. *Id.* He did not bring a workers' compensation claim, but made a claim for medical expenses and lost wages under no-fault. *Id.* The court held that an injured party cannot elect to seek no-fault benefits rather than workers' compensation benefits. *Id. See also* 2A, A. LARSON, WORKMEN'S COMPENSATION LAW, § 71.24(b) (1990). In New York, an employee cannot merely by-pass his compensation rights and rely exclusively on no-fault benefits. *Id.*

[74] *See* N.Y. WORK. COMP. LAW § 29(1-a) (McKinney 1965 & Supp. 1990) (limiting lien on third-party tort recoveries for payments made in lieu of first-party benefits).

When § 29(1-a) was enacted, no-fault carriers could still offset first-party benefits by the amount paid by compensation carriers in lieu of first-party benefits. N.Y. INS. LAW § 5102(b)(2) (McKinney 1985 & Supp. 1990). The compensation carriers, however, were no longer able to execute liens on payments they made in lieu of first-party benefits due to the limitation imposed by § 29 (1-a). N.Y. WORK. COMP. LAW § 29(1-a) (McKinney 1965 & Supp. 1990).

This solution enacted by the legislature differed from the holding in *Grello*. *See Grello*, 44 N.Y.2d at 896, 379 N.E.2d at 162, 407 N.Y.S.2d at 634 (no-fault carrier bears loss if workers' compensation carrier executes lien). *See also* GOVERNOR'S BILL JACKET, L.1978, ch. 572, BUDGET REPORT ON BILLS, S. 10275-B, at 4 (1978). The budget report stated that due to limitations placed on workers' compensation carriers by modification of § 29, "compensation carriers would be unable to seek recovery of all compensation . . . paid to injured employees in no-fault accidents," thus increasing the cost of maintaining the workers' compensation system. *Id. See generally* GOVERNOR'S BILL JACKET, L.1978, ch.572, WORKMEN'S COMPENSATION BOARD LETTER OF JULY 13, 1978, A. 10275-B, at 1 (1978) (letter noted that codification of holding in *Granger* would "involve a loss of monies to the compensation carriers and could result in some increase in premiums").

[75] *See supra* notes 54 and 64 (explaining legislative intent to minimize costs of workers' compensation system).

[76] *See supra* note 73-74 (demonstrating legislative intent, upon enactment of § 29(1-a), to make workers' compensation carriers bear additional costs).

i.e., basic economic losses; otherwise there would be no need for the no-fault deduction.[77] One New York court, examining the legislative history of both no-fault and the WCL, concluded that workers' compensation payments must be equivalent to first-party benefits because the two forms of benefits are interchangeably definable as first-party benefits.[78]

Second, the legislature's solution differed from the result in *Grello* in that it eliminated the financial liability of the no-fault carriers of some, if not all, of the burden to pay for first-party benefits.[79] Now, under section 29(1-a), no-fault carriers will only pay first-party benefits when the benefits under workers' compensation fall short of the maximum amount allowable as first-party benefits.[80]

Given the foregoing, it is submitted that the legislature's intent was not only to make workers' compensation carriers primarily re-

[77] *See* Granger v. Urda, 44 N.Y.2d 91, 98, 375 N.E.2d 380, 382, 404 N.Y.S.2d 319, 322 (1978). The court, citing the Governor's Memorandum of Approval, N.Y. Legis. Ann., 1973, at 298, observed that "there now exists a new insurance reparations system which—assures that every auto accident victim will be compensated for substantially all of his [basic] economic loss, promptly and without regard to fault." *Id. See, e.g.*, State Farm Mut. Ins. Co. v. Brooks, 78 App. Div. 2d 456, 458, 435 N.Y.S.2d 419, 421 (4th Dep't 1981) (no-fault enacted primarily to assure that auto victims are compensated for economic loss); *Grello*, 58 App. Div. 2d at 413, 397, N.Y.S.2d at 397 (both WCL and no-fault are concerned with compensating injured party).

[78] *See* Fox v. Atlantic Mut. Ins. Co., 132 App. Div. 2d 17, 23, 521 N.Y.S.2d 442, 446 (2d Dep't 1987). In *Fox*, the court asserted that:

> The fact that workers' compensation benefits were considered by the Legislature to be interchangeable with first-party benefits, is exemplified by Insurance Law § 5102(b)(2), which provides, in pertinent part, that amounts "recovered or recoverable" as workers' compensation shall be offset against the amount of first-party benefits which a no-fault carrier would otherwise be obligated to pay. Thus, since the no-fault carrier need not pay its insured first-party benefits to the extent that a workers' compensation award is recovered and since the no-fault scheme expressly authorizes such a deduction, there can be little doubt that these forms of benefits were intended to cover the same loss, to wit, basic economic loss.

Id.

[79] *See supra* note 74 (explaining different solution behind enactment of § 29(1-a) than what court in *Grello* held).

[80] *See* N.Y. INS. LAW § 5102(b)(2) (McKinney 1985 & Supp. 1990). It should be noted that under the express language of § 5102(b)(2), the no-fault carrier has an offset only for the exact amount of benefits paid by the workers' compensation carrier which were in lieu of first-party benefits. *Id.* It is therefore possible that workers' compensation benefits will be less than the full amount of first-party benefits that an injured worker is entitled to recover. *See id.* Thus, the no-fault carrier may still pay for that amount of first-party benefits above the portion already paid by the workers' compensation carriers. *Id.* However, workers' compensation carriers are still the primary source of first-party benefits. *Id.*

sponsible for the payment of first-party benefits, but more importantly, to limit the lien in order to preserve third-party tort recoveries for pain and suffering[81] at the expense of the workers' compensation carriers.[82] The court in *Dietrick*, equating payments for serious facial disfigurement and permanent partial disability with first-party benefits, recognized this legislative intent by not allowing a workers' compensation carrier's lien on third-party recoveries for such payments.

Notwithstanding the absence of an express legislative statement as to whether recoveries for permanent partial disability and seri-

[81] *See* GOVERNOR'S BILL JACKET, L.1978, c.572, BUDGET REPORT ON BILLS, S.10275-B, at 3 (1978). The Budget Report addressed this issue by giving an example as to how § 29(1-a) should function. The example assumes that a worker has sustained and received $32,000 of basic economic loss from the no-fault carrier in a work-related automobile accident, $21,500 of compensation benefits, and a general damage award totalling $60,000 at trial. *Id.* The example then discusses the effect § 29 (1-a) will have as follows:

> Upon an award in his favor of $60,000, the court reduces the amount by $32,000 pursuant to [N.Y. INS. LAW § 5104 for the amount of basic economic loss] for a final judgment of $28,000. After the final judgment is issued, the claimants [sic] compensation carrier attaches a lien against the judgment for compensation benefits paid pursuant to Section 29 of the Workers' Compensation Law of $21,500, reducing the amount paid the claimant to $6,500. Thus, under current provisions of the law, the claimant would receive a sum of $32,500 ($26,000 in compensation benefits, and $6,500 for pain and suffering) whereas under this bill he would receive $54,000 ($26,000 for compensation and $28,000 for pain and suffering).

Id.

Given the above, two observations should be made. First, where general damages are awarded, the amount of money paid above the basic economic loss is, *per se*, considered by the legislature to be money paid for pain and suffering. *Id. See also Grello*, 58 App. Div. 2d at 416, 397 N.Y.S.2d at 399 ("traditional tort concepts remain viable only where the injured party sustains 'economic' losses in excess at or of longer duration than 'basic economic loss' or where a 'serious' injury has been sustained"). Therefore, the above example is equally applicable to situations where the parties settle for an amount which exceeds basic economic loss as when a jury delivers a verdict. GOVERNOR'S BILL JACKET, L.1978, c.572, BUDGET REPORT ON BILLS, S.10275-B, at 3 (1978). Second, the specific result, expressly stated by the Senate, is that the net recovery for pain and suffering will be increased ($28,000 instead of $6,500) so that the total recovery will be increased ($54,000 versus $32,500). *Id.*

In addition, in a letter from the New York State Insurance Department to the Governor, it was observed that "[p]ermitting a workers' compensation or disability benefits provider's lien to remain applicable to pain and suffering recoveries pursuant to [the no-fault statute] results in a double offset and leaves *Granger* and others, less than whole." *Id.* The legislature did not continue to permit liens to be attached to third-party tort recoveries for payments made in lieu of first-party benefits. *See* N.Y. WORK. COMP. LAW § 29(1-a) (McKinney 1965 & Supp. 1990). *See also supra* note 73 (explaining limitations on § 29(1) liens under WCL).

[82] *See supra* note 73-74 (explaining that additional costs to workers' compensation carriers would be result of § 29(1-a) limitation on liens).

ous facial disfigurement were in lieu of first-party benefits, the WCL is a remedial statute and, therefore, should be construed liberally so as to best protect the injured party.[83] A liberal interpretation of section 29(1-a) would consider payments for permanent partial disability and serious facial disfigurement to be first-party benefits, and would only permit the lien when payments for those injuries exceed the statutory limit for first-party benefits.[84] This interpretation would make injured employees whole since they would receive payments for basic economic losses due to permanent partial disability and serious facial disfigurement from workers' compensation and no-fault, and economic and non-economic losses for such injuries in the form of recoveries from third-party tort actions.[85] It is submitted that, without such a liberal interpretation, workers' compensation carriers would be able to recoup payments made for first-party benefits out of recoveries for pain and suffering, thus defeating the legislature's intent to fully compensate the injured party.

[83] *See* Wood v. Firestone Tire & Rubber Co., 123 Misc. 2d 812, 813-14, 475 N.Y.S.2d 735, 737 (Sup. Ct. Saratoga County 1984) (advocating liberal interpretation of WCL § 29 favoring employee). *See also* Heitz v. Ruppert, 218 N.Y. 148, 154, 112 N.E. 750, 752 (1916) (law under employers' liability act "should be construed fairly, . . . liberally, in favor of employee"); Illaqua v. Barr-Llewellyn Buick Co., Inc., 81 App. Div. 2d 708, 439 N.Y.S.2d 473, 474 (3d Dep't 1981) (fundamental principle of WCL § 29 is protection of worker, not employer, so it should be construed liberally to favor employee); Appellant's Brief, *supra* note 5, at 11 (WCL is beneficial and remedial in character and should be interpreted liberally in order to accomplish its humanitarian goals); J.V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 8 (2d ed. 1989) (workers' compensation is remedial in character and should be liberally construed in favor of beneficiary).

[84] N.Y. INS. LAW § 5102(b)(2) (McKinney 1985 & Supp. 1990). Most courts have asserted that the lien should not be vacated totally within the context of no-fault, but instead should be limited to those benefits which exceed the limit of first-party benefits. *See, e.g.*, Fellner v. Country Wide Ins., 95 App. Div. 2d 106, 109-10, 466 N.Y.S.2d 766, 769 (3d Dep't 1983) (limitation in WCL § 29(1-a) not applicable after carrier pays $50,000); Vinson v. Berkowitz, 83 App. Div. 2d 531, 533, 441 N.Y.S.2d 460, 462 (1st Dep't 1981) ("[b]ut once the ceiling of $50,000, in basic economic loss is reached, the compensation carrier has a right to offset any further benefits due against a recovery from a tort-feasor, especially since that recovery would not include basic economic loss"); Cederman v. Liberty Mut. Ins. Co., 58 App. Div. 2d 969, 970, 397 N.Y.S.2d 252, 253 (4th Dep't 1977) (with regards to no-fault law, § 29(1) should be limited); Scott v. Orange County Dept. of Health, 89 Misc. 2d 853, 856, 393 N.Y.S.2d 156, 158 (Sup. Ct., Orange County 1977) (once workers' compensation payments exceed $50,000, lien "may attach to proceeds of any settlement for damages for injuries received by recipient of compensation benefits to extent of such excess").

[85] Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 252-54, 566 N.E.2d 1108, 1110-12, 557 N.Y.S.2d 301, 303-05 (1990).

B. Constitutionality of the Workers' Compensation Law

Even before the enactment of no-fault, many workers' compensation carriers argued that the WCL provisions dealing with permanent partial disability and serious facial disfigurement provided benefits "wholly independent of claimant's inability to work"[86] and were, therefore, unconstitutional.[87] Notwithstanding this contention, both the United States Supreme Court and the New York Court of Appeals have held that the WCL is constitutional because payments for permanent partial disability and serious facial disfigurement actually are related to loss of earnings.[88] Not only may serious facial disfigurements or permanent partial disability render the victim unable to perform his trade, but it is likely that it may have a detrimental effect on the victim's ability to obtain or maintain her status at any job due to the repulsive nature of the disfigurement or the lingering effect of the disability.[89] Therefore,

[86] New York Cent. R.R. v. Bianc, 250 U.S. 596, 597 (1919).

[87] *See id.* at 600-01; Sweeting v. American Knife Co., 226 N.Y. 199, 199-200, 123 N.E. 82, 83 (1919).

In *New York Cent. R.R. v. Bianc*, the plaintiffs' contention was that the WCL provisions granting compensation awards for permanent partial disability and serious facial or head disfigurement were violative of the 14th amendment of the United States Constitution for taking property without due process of law. *Bianc*, 250 U.S. at 600-01.

In *Sweeting v. American Knife Co.*, workers' compensation carriers and employers argued that an award for disfigurement constituted damages, not compensation for loss of earning power, therefore the employer was being deprived, without fault, of property rights without due process of law. *Sweeting*, 226 N.Y. at 199-200, 123 N.E. at 83.

[88] *See Bianc*, 250 U.S. at 601; *Sweeting*, 226 N.Y. at 201-03, 123 N.E. at 83. The United States Supreme Court in *Bianc* determined that a serious disfigurement of the face or head may very well have a direct relationship to the victims ability to regain his earning power. *See Bianc*, 250 U.S. at 601.

The New York Court of Appeals in *Sweeting* presumed that the legislature found serious disfigurement was related to loss of earnings. *Sweeting*, 226 N.Y. at 201, 123 N.E. at 83. Judge Cardozo, writing for the majority, concluded that "one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims," and continued by maintaining that in most situations the victim would be put at a disadvantage when placed in competition with others. *Id.* Additionally, there is a presumption that the Workers' Compensation Board has weighed all relevant circumstances in its assessment, so there is no need for a jury trial to determine what is "fair and equitable." *Id.* at 202, 123 N.E. at 83. Furthermore, even though awards for permanent partial disability and serious facial disfigurement are difficult to determine, the Act is not invalid because the commission has some discretion. *Id.* at 203, 123 N.E. at 83. *See also supra* notes 40, and 55-57 and accompanying text (explaining relationship between loss of earnings and disfigurement).

[89] *See Sweeting*, 226 N.Y. at 204, 123 N.E. at 84. Judge Pound concurred in the majority's holding that workers' compensation awards for serious head or facial disfigurement are related to loss of earnings, but noted that it is not so much due to the victim's inability to work, as to her inability to get work. *Id.* Judge Pound maintained that "[e]mployers

awards for such injuries are based upon the impairment of earning capacity and should be deemed equivalent to first-party benefits.[90]

C. *Impermissibility of Concurrent Awards*

Workers' compensation awards for permanent total disability[91] unquestionably have been deemed to be equivalent to lost wages.[92] Consequently, the fact that the WCL will not permit a worker who has been classified as permanently totally disabled to

might refuse to employ a disfigured man in his trade either from lack of confidence in his unimpaired ability or because it would be unpleasant for others to work beside him or unprofitable to have him meet the customers." *Id. See also* Iacone v. Cardillo, 208 F.2d 696, 699 (2d Cir. 1953) (WCL provides for facial or head disfigurement and is based upon loss of earnings capacity because employer will hesitate to employ disfigured worker and fellow employees will object to worker's presence due to worker's appearance).

[90] *See* J. WORRALL, SAFETY AND THE WORK PLACE, 18-21 (1983). In discussing the controversial nature of permanent partial disability payments throughout the United States, it was explained that due to the injured employee's inability to work or gain work, she suffers from either a loss of earning capacity or an actual loss of earnings. *Id.* It was reiterated, however, that in essence those two aspects of work disability accompany each other; a loss of earnings is created from a loss of earning capacity, and vice versa. *Id. See id.* at 22 (graphical depiction of loss of actual earnings sustained by permanently disabled workers).

Even though in New York State it has been established that earning capacity does not have to be impaired before an award for facial disfigurement or permanent partial disability can be allocated, it has still been held that such disabilities do, on average, impair earning capacity. *See, e.g.*, Leone v. Bricklayers, Masons & Plasterers Int'l Union No. 83, 59 App. Div. 2d 812, 812, 398 N.Y.S.2d 917, 918 (3d Dep't 1977) (workers' compensation board does not have to establish earning capacity has been impaired in order to give award for facial disfigurement); Farley v. Martin Mechanical Corp., 31 App. Div. 2d 285, 287, 297 N.Y.S.2d 359, 361 (3d Dep't 1969) (claimant for workers' compensation benefits does not have to wait until he cannot perform trade and suffers loss of earnings in order to recover compensation for permanent partial disability), *aff'd*, 26 N.Y.2d 635, 255 N.E.2d 726, 307 N.Y.S.2d 471 (1970); Florick v. Broad Window Cleaning Co., 243 N.Y. 576, 576, 154 N.E. 611, 611 (1926) (award for facial disfigurement can be made even though earning capacity has been unimpaired).

[91] *See* N.Y. WORK. COMP. LAW Section 15(1) (McKinney 1965 & Supp. 1990). Section 15(1) states that in the case of permanent total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. *Id.*

[92] *See* Dietrick v. Kemper Ins. Co., 145 App. Div. 2d 8, 11, 537 N.Y.S.2d 372, 374 (4th Dep't 1989). *See also* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 63 (1972) (permanent total disability benefits should be paid to workers when injury prohibits substantial gainful activity for extended period of time); STATE WORKMEN'S COMPENSATION LAWS: A COMPARISON OF MAJOR PROVISIONS WITH RECOMMENDED STANDARDS 30 (1965) (when worker is determined permanently and totally disabled, disability will last for rest of life); Dachs & Dachs, *A Call for Legislative Action*, N.Y.L.J., Aug. 14, 1990, at 3, col 3 (workers' compensation payments for permanent disability are readily identifiable as first-party benefits).

receive a concurrent award for permanent partial disability or serious facial disfigurement[93] supports the court of appeal's conclusion that "the same theory and relationship between compensation and loss of earnings or earning capacity underlie all types of workers' compensation awards."[94] An award for permanent total disability is the broadest extent of recovery; it compensates an injured employee for his lost wages, and covers all other disabilities.[95] It has been consistently held that if an injured employee were to receive concurrent awards, he would be receiving an overlap of economic losses.[96] The purpose, therefore, of permanent partial disability and serious facial disfigurement payments, as with payments for permanent total disability, is to compensate an employee for present and future loss of earning capacity.[97] It is sub-

[93] *See* N.Y. WORK. COMP. LAW §15(8) (McKinney 1965 & Supp. 1990). This provision of the WCL allows payments for permanent total disability to be given to one who has previously suffered from permanent partial disability, only after the cessation of the payments for permanent partial disability. *See id.* at § 15(8)(c). Additionally, if an employee suffering from a permanent physical impairment incurs a subsequent disability caused by both conditions combined, and the compensation is now greater than if the subsequent injury occurred alone, the workers' compensation carrier shall pay the higher amount, but be reimbursed for the previously paid lower amount. *See id.* at § 15(8)(d).

[94] Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 254, 556 N.E.2d 1108, 1111, 557 N.Y.S.2d 301, 304 (1990). *See infra* note 96 and accompanying text (discussing WCL payments' relation to lost earnings).

[95] *See* Wilkosz v. Symington Gould Corp., 14 App. Div. 2d 408, 410, 221 N.Y.S.2d 209, 211 (3d Dep't 1961). *See also* Fredenburg v. Empire United Ry., 168 App. Div. 618, 622-23, 154 N.Y.S. 351, 354 (3d Dep't 1915). In *Fredenburg*, the court stated that the WCL provides a single maximum rate of compensation for total disability applicable to all disabilities whether total or partial. *Id.* If concurring awards were permitted, an unjust result would burden the employer and defeat the beneficial nature of the statute. *Id.*

[96] *See, e.g.*, Gallman v. Walt's Tree Serv. Inc., 43 App. Div. 2d 419, 420, 352 N.Y.S.2d 516, 517 (3d Dep't 1974) (whole theory of WCL is to compensate injured employee for lost wages, therefore concurrent payments would result in double compensation and contradict purpose of WCL); Kaminski v. Mohawk Carpet Mills, 11 App. Div. 2d 827, 827, 202 N.Y.S.2d 731, 732 (3d Dep't 1960) (award for facial disfigurement cannot be made to one permanently totally disabled; same is true for one temporarily totally disabled); Beekman v. New York Evening Journal, 258 App. Div. 833, 833, 15 N.Y.S.2d 671, 672 (3d Dep't 1939) (where compensation award was made for permanent total disability, additional awards for loss or disability was not permissible); Clark v. Hayes, 207 App. Div. 560, 564, 202 N.Y.S. 453, 455 (3d Dep't) (in light of both case law and statutory construction, it would be contrary to general policy of WCL to permit overlapping awards), *aff'd*, 238 N.Y. 553, 144 N.E. 888 (1924).

[97] *See Wilkosz*, 14 App. Div. 2d at 410, 221 N.Y.S.2d at 211. In *Wilkosz*, the court maintained:

> [I]n this State and in the Federal courts, it has been consistently held that the purpose of a schedule award is to compensate the employee for immediate or prospective loss of earnings or earning capacity . . . . In facial disfigurement cases . . . the

mitted that the legislature never intended to classify awards for permanent partial disability and serious facial disfigurement as non-economic in nature. If the legislature had intended payments for permanent partial disability and serious facial disfigurement to compensate for non-economic losses, then an injured worker would be able to recover concurrent awards for permanent total disability as well as for permanent partial disability and/or serious facial disfigurement.[98]

II. Equating Loss of Earnings under No-fault and the WCL

A. Lost Earnings — Actual and Presumed

It is submitted that the implicit issue which divided the *Dietrick* court revolved around how to correlate the classification of payments allowed under the WCL with payments made for lost earnings allowed under no-fault.[99] Under no-fault, an individual is

same theory and the relationship between any kind of compensation and loss of earnings or earning capacity, has been recognized.

Id. See also Iacone v. Cardillo, 208 F.2d 696, 700 (2d Cir. 1953) (compensation law is held together by applying schedule awards in terms of wage-earning capacity); Marhoffer v. Marhoffer, 220 N.Y. 543, 548, 116 N.E. 379, 380 (1917) (earning power decreases with any type of loss of physical function); Jensen v. Southern Pac. Co., 215 N.Y. 514, 524, 109 N.E. 600, 603 (1915) (WCL allows compensation for loss of earning capacity only); Grello v. Daszykowski, 58 App. Div. 2d 412, 417 n.4, 397 N.Y.S.2d 396, 400 n.4 (2d Dep't 1977) (payments on basis of partial loss of body part or facial disfigurement are to compensate for loss of earnings), *rev'd on other grounds*, 44 N.Y.2d 894, 379 N.E.2d 161, 467 N.Y.S.2d 133 (1978); Appellant's Brief, *supra* note 4, at 10 (awards for permanent partial disability have been consistently held equivalent to loss of earning capacity). *See generally* J.V. Nackley, Primer on Workers' Compensation 48 (1989) (purpose of permanent partial and permanent total disability payments is to compensate injured party for prospective loss, even though loss is measured by amount of wages worker was earning when injury occurred); Workers' Compensation Board Guide for Evaluating Disability, Appendix G (unpublished manuscript) ("schedule awards are not meant to be payment of damages, but are compensation for impairment to perform gainful work").

[98] *See Wilkosz*, 14 App. Div. 2d at 410, 221 N.Y.S.2d at 211. Recognizing the legislative intent of § 15 of the WCL, Judge Coon maintained that "[t]here is nothing in section 15 of the Workmens' Compensation Law which would be construed as expressly authorizing a concurrent total and partial disability." *Id. See* N.Y. Work. Comp. Law § 15(8) (McKinney 1965 & Supp. 1990). The legislative intent, as illustrated in WCL § 15(8), with respect to payments for permanent total or permanent partial disability, was declared to be compensation to enable the injured party to support himself; there was never any mention of an allotment of damages in order to allay the victim for his pain and suffering. *See id.*; Croce v. Ford Motor Co., 282 App. Div. 2d 290, 291-92, 123 N.Y.S.2d 705, 706 (3d Dep't 1953), *rev'd on other grounds*, 307 N.Y. 125, 120 N.E.2d 527 (1954).

[99] *See* Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 253-54, 556 N.E.2d 1108, 1111-12,

compensated for actual lost earnings[100] calculated from the date of the accident to a maximum period of three years.[101] Under the WCL, an individual is compensated for lost earnings or earnings capacity,[102] whether actual or presumed.[103] WCL payments, therefore, may represent replacement of earnings over the remaining lifetime of the injured workers.[104] It is submitted that one of the real differences between lost earnings under no-fault and lost earnings or earnings capacity under the WCL is the time period which these benefits represent. Given the greater time period over which workers' compensation payments may compensate injured workers, it becomes difficult to neatly equate the concept of lost earnings under both no-fault and the WCL.

Another difficulty involves the two statutes' differing approaches to the compensation of lost earnings. The WCL presumes lost earnings, whereas no-fault requires actual lost earnings.[105] The greatest tension over lost earnings between no-fault

557 N.Y.S.2d 301, 303-04 (1990).

[100] *See* N.Y. INS. LAW § 5102 (McKinney 1985 & Supp. 1990). *See also* State Farm Auto. Ins. Co. v. Brooks, 78 App. Div. 2d 456, 458-59, 435 N.Y.S.2d 419, 421-22 (4th Dep't 1981) (purpose of § 672 [now § 5102] is payment of actual lost earnings); Hughes v. Nationwide Mut. Ins. Co., 98 Misc. 2d 667, 671, 414 N.Y.S.2d 493, 496-97 (Sup. Ct. Livingston County 1979) ("it is apparent that only wages actually paid, or payable in the future . . . are contemplated or compensated as no-fault benefits").

[101] *See* Grello v. Daszykowski, 58 App. Div. 2d 412, 416-17 n.4, 397 N.Y.S.2d 396, 397 n.4 (1977), *rev'd on other grounds*, 44 N.Y.2d 894, 379 N.E.2d 161, 407 N.Y.S.2d 633 (1978). The appellate division stated:

> Although it appears that plaintiff received scheduled loss compensation on the basis of a partial loss of use of his legs and right hand, and a lump-sum settlement on the basis of facial disfigurement, it has been consistently held that the purpose of a schedule award is to compensate the employee for immediate or prospective loss of earnings or earning capacity. In facial disfigurement cases the same theory and the relationship between any kind of compensation and loss of earnings or earnings capacity, has been recognized.

Id. (citations omitted).

[102] *See supra* notes 40, 54-57, and 88-90 (explaining that all workers' compensation benefits are to compensate for lost earnings or earnings capacity).

[103] *Id. See* Sweeting v. American Knife Co., 226 N.Y. 199, 201, 123 N.E. 82, 83 (1919). Judge Cardozo observed that "[l]awmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy." *Id. See generally* Marhoffer v. Marhoffer, 220 N.Y. 543, 547-48, 116 N.E. 379, 380 (1917) (injuries like serious facial disfigurement may not necessarily impair earning power for any fixed period, but that statute still refers to this type of disability as impairment to earning capacity and compensation for loss of earnings or earnings capacity).

[104] *See generally supra* notes 91 and 92 (injured workers may receive compensation over lifetime).

[105] *Compare* N.Y. WORK COMP. LAW § 15 (McKinney 1965 & Supp. 1990) *with* N.Y. INS.

and the WCL arises when the injured employee experiences no actual lost earnings within the three year time limit under no-fault, but experiences a potential for a loss of future earning capacity beyond three years. As previously noted, sections 29(1) and 29(1-a) were enacted to make workers' compensation carriers, rather than no-fault carriers, primarily responsible for the payment of first-party benefits.[106] It is submitted, therefore, that it was also the legislature's intent to construe lost earnings according to the WCL definition rather than according to the narrower concept of actual lost income under no-fault. The court's ruling in *Dietrick*, equating workers' compensation awards for serious facial disfigurement and permanent partial disability with first-party benefits, effectively recognizes the legislative intent to expand the definition of first-party benefits, in cases involving work related automobile accidents, to include lost earnings, whether actual or presumed. Therefore, the court's holding was appropriate because such injuries generally affect an injured party's future earning capacity rather than just her actual lost earnings.

B. The Windfall Issue

The appellate division in *Dietrick* reasoned that payments for permanent partial disability and serious facial disfigurement which "are for periods which may extend far beyond the actual lost time from work"[107] are more akin to pain and suffering than to first-party benefits.[108] Therefore, the fourth department viewed the simultaneous award for pain and suffering, serious facial disfigurement and permanent partial disability as a double recovery.[109] The court relied on several cases which supported the view that this simultaneous award had the appearance of being compensation for pain and suffering.[110] Such an appearance was implicitly caused by the fact that the workers' compensation board has dis-

LAW § 5102 (McKinney 1985 & Supp. 1990).

[106] *See supra* notes 73, 74, 78 and 80 (statutory scheme of no-fault and workers' compensation makes workers' compensation carriers primarily liable for first-party benefits).

[107] *Dietrick*, 145 App. Div. 2d at 8, 11, 537 N.Y.S.2d at 372, 374.

[108] *Id.*

[109] *Id.*

[110] *Id.*

cretion in determining awards for such payments and that these payments[111] may extend beyond the lost time from work.[112] It is submitted, however, that this mere appearance does not sufficiently rebut the well established argument that such payments will ultimately compensate for lost earnings or earnings capacity at some time during an injured worker's life.

The New York Court of Appeals responded to the appellate division's reservations concerning the potential creation of a "windfall."[113] The majority maintained that no windfall would occur because awards for permanent partial disability and serious facial disfigurement fall within the definition of basic economic loss and a victim is unable to recover for such losses in a direct action under no-fault.[114] It is suggested that the court should not be understood to mean that economic and non-economic losses arising from such injuries cannot be recovered in a third-party tort action.[115] Instead, it is submitted that the court is only precluding an injured worker's recovery for basic economic losses stemming from serious facial disfigurement and permanent partial disability. Thus, any third-party recoveries for economic losses and/or pain and suffering arising from such injuries are an addition, and not a preclusion to recoveries under workers' compensation.

[111] *See* N.Y. WORK. COMP. LAW § 20 (McKinney 1965 & Supp. 1990) ("board shall have full power and authority to determine all questions in relation to the payment of claims").

[112] *Dietrick*, 145 App. Div. at 11, 537 N.Y.S.2d at 374. It should be noted, however, that the dissent cites no statistics on what percentage of awards for serious facial disfigurement and permanent partial disability represent payments which go substantially beyond the actual time lost from work, especially in work related automobile accidents. Dietrick v. Kemper, 76 N.Y.2d 248, 254, 55, 556 N.E.2d 1108, 1112, 550 N.Y.S.2d 304, 305 (1990). In addition, it appears the dissent loses sight of the fact that the legislature authorizes such awards simply because, on average, loss of earnings or earnings capacity will be the probable consequence when a worker sustains these types of injuries. *See also supra* notes 91 and 92 (permanently injured workers suffer loss of earnings throughout lifetime).

[113] *Dietrick*, 76 N.Y.2d at 254, 556 N.E.2d at 1111, 557 N.Y.S.2d at 304.

[114] *See id.* at 254, 556 N.E.2d at 1110, 557 N.Y.S.2d at 304-05 (1990).

[115] *See* N.Y. INS. LAW § 5104 (McKinney 1985 & Supp. 1990). Section 5104(a) of the Insurance Law expressly gives an injured driver the right to sue a third-party for non-economic losses if the injury is "serious," a term that includes significant disfigurement. *Id.* at § 5104(a). *See also* Agnastakios v. Laureano, 85 Misc. 2d 203, 208, 379 N.Y.S.2d 664, 668 (N.Y.C. Civ. Ct. N.Y. County 1976) (primary purpose of no-fault is to afford rapid payment of first-party benefits without regard to fault, not to unduly hamper potential litigation for recovery of non-economic loss where unwarranted). *See also* Dachs & Dachs, *A Call for Legislative Action*, N.Y.L.J., Aug. 14, 1990, at 3, col 3 (legislature should address issue of third-party recoveries for pain and suffering arising out of work-related automobile accident resulting in serious facial disfigurement).

The practical effect of the *Dietrick* ruling brings to light another aspect of the windfall issue. As previously noted, the legislative intent behind the enactment of the section 29(1) lien was to minimize costs within the workers' compensation system.[116] As a result of the lien, those injured in work related automobile accidents were receiving less for pain and suffering in third-party actions than those not injured in work related automobile accidents, assuming equivalent injuries.[117] It is submitted that, with the enactment of section 29(1-a) and the court's holding in *Dietrick*, workers may now keep the same amounts recovered in third-party actions for pain and suffering as non-workers. It is also submitted that no windfall results if the injured worker receives more than he would have before the enactment of section 29(1-a) because the legislature intended to ensure that injured workers be made whole from all sources and that they not become a burden to society.[118] This extra compensation merely reflects the means used to accomplish legitimate legislative goals and puts the compensation claimant on an equal footing with the non-compensation claimant.

III. Legislative Proposals

Despite the propriety of the *Dietrick* court's holding that payments for serious facial disfigurement and permanent partial disability are in lieu of first-party benefits, there is still a need for legislative action in order to fully clarify the interaction between no-fault and the WCL. With the enactment of section 29(1-a), the legislature specified that liens should not attach to third-party recoveries when workers' compensation payments are in lieu of first-party benefits.[119] It is proposed that the legislature should go beyond the limits of the section 29(1) lien already imposed by sec-

[116] *See supra* note 54 (explaining legislative intent behind enactment of § 29(1)).

[117] *See* Granger v. Urda, 44 N.Y.2d 91, 99, 375 N.E.2d 380, 383, 404 N.Y.S.2d 319, 322 (1978). The "harsh, unintended result" obtained when the worker is involved in an auto accident would not occur if the victim is not at work. *See id.*

[118] *See* Wiggins v. Carter, 178 N.Y.L.J., Dec. 5, 1977, at 13, col. 1 (Sup. Ct. Bronx County 1977). In *Wiggins*, the court stated that the sweeping language of § 29 had to be restricted, otherwise a driver injured on the job would be prevented from achieving the same award for out-of-pocket loss as an unemployed injured person in the same auto accident. *Id. See also supra* notes 18, 55, 73 and 80 (purpose behind WCL was to make injured workers whole and prevent workers from becoming burden to society).

[119] N.Y. Work. Comp. Law § 29(1-a) (McKinney 1965 & Supp. 1990).

tion 29(1-a) and specify that workers' compensation liens should only attach to that portion of third-party recoveries which constitute economic losses.[120] If the section 29(1) lien is allowed to attach to the part of the third-party recovery which constitutes pain and suffering, there would be a recurrence of a debit. The total monies available to compensate the injured worker for all of her losses would be reduced because benefits paid to compensate for lost earnings would be recouped from recoveries for pain and suffering. The proposal submitted would effectively eliminate the reduction of awards for pain and suffering and ensure that injured workers receive full compensation for economic, basic economic and non-economic losses. Compensation carriers, in turn, will still be able to recoup monies previously paid for lost earnings and, therefore, prevent workers from receiving double recoveries for basic economic loss.

Such a proposal should not be difficult to administer in the case where a jury awards a verdict in a third-party action. At trial, the workers' compensation carrier can request that the jury be given a special instruction to itemize the verdict as to what portion of the recovery is for pain and suffering and what portion is for economic loss. The difficulty arises, however, when there is a settlement between the injured person and the third-party. Since most tort cases are settled, this becomes an important issue.

Two proposals have been considered in order to deal with settlement cases. First, there can be a requirement of a hearing to determine whether the settlement represents economic losses, non-economic losses or both.[121] At the hearing, if the settlement of the third-party action is determined by a judge or other referee to be solely in lieu of pain and suffering, the lien should not attach

[120] *See* N.Y. INS. LAW § 5102 (McKinney 1985 & Supp. 1990).

[121] *See* Wiggins v. Carter, 178 N.Y.L.J., Dec. 5, 1977, at 13, col. 1 (Sup. Ct. Bronx County 1977). This case arose prior to the enactment of § 29(1-a), and dealt with an employee injured in a car accident during the course of employment. *See id.* The injured party settled with the negligent third-party, and an issue arose involving the extent to which the § 29(1) lien should apply specifically when there is a third-party settlement. *Id.* The court in *Wiggins* held that if any part of the settlement had been for lost wages and medical expenses, thereby fitting into the definition of basic economic loss, the lien would attach, but if the settlement was solely for pain and suffering, the lien should not attach. *Id.* at 13, col. 2. In order to solve the ambiguity as to what the settlement constituted, the court stated that a hearing on such question was required. *Id.*

to the settlement. On the other hand, if the settlement is determined to represent both economic and non-economic losses, then only that portion of the settlement deemed to be economic loss should be subject to the section 29(1) lien. Second, for administrative ease, the legislature could designate that no lien can attach to the first $36,000 of a settlement, the maximum allowable amount for lost earnings under no-fault. The underlying presumption would be that this portion of a settlement is for pain and suffering. Thus, no hearing on the issue would be needed.

Although this Comment only dealt with the situation where employees were injured in automobile accidents during the course of their employment, it is also proposed that the section 29(1) lien should be similarly restricted in all cases where an injured worker receives a third-party tort recovery. Such a restriction on the section 29(1) lien would be consistent with the theory behind the WCL that compensation benefits are equivalent to lost earnings, and the legislature's intent to ensure that injured workers are fully compensated for all losses. Thus, the same procedures used in determining the economic loss component of third-party tort recoveries in automobile related accidents could similarly be used in other work related tort cases.

Conclusion

When the WCL was interacted with other statutory schemes, confusion arose where the legislature was not clear as to how conflicting provisions should be integrated. In concluding that permanent partial disability and serious facial disfigurement payments are first-party benefits, the New York Court of Appeals applied longstanding theories that workers' compensation payments are economic in nature and that both permanent partial disability and serious facial disfigurement have the capacity to decrease earning power. The conclusion that workers' compensation payments for such injuries were in lieu of first-party benefits merely grafted these fundamental principles onto no-fault by expanding the definition of first-party benefits. Injured employees who receive payments for permanent partial disability and serious facial or head disfigurement will be fully compensated for their first-party benefits because workers' compensation carriers will no longer be able

to assert liens on third-party tort recoveries to recoup such payments. Nonetheless, legislation should be initiated to require that section 29(1) liens should never attach to third-party tort recoveries for non-economic losses arising out of any work related accidents. The liens would only attach to that portion of third-party tort recoveries comprising economic losses and, therefore, the workers' compensation carriers will only recoup monies equivalent in kind to workers' compensation payments.

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