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ENFORCEABILITY OF WORKMEN'S
COMPENSATION LIENS AND
PREVENTION OF DOUBLE
RECOVERY — NEW
DIMENSIONS

Thomas Pace*

As a matter of first impression, the District of Columbia Court of Ap-
peals recently held in *Travelers Insurance Co. v. District of Columbia*¹ that
an employer or its subrogated insurer² having made workmen's compensa-
tion payments to an employee must formally intervene in that employee's
suit against a third party for the work-related injury in order to assert a
lien for reimbursement from any recovery proceeds. Absent such interven-
tion, the third party, including one having notice of the employer's recoup-
ment interest, can pay recovery proceeds to the injured employee without
any resultant liability to the employer.³ Moreover, in a related case now
pending before the court of appeals, *Travelers Insurance Co. v. Jones*,⁴ a
superior court judge held that, absent such intervention by the employer,
recoupment of workmen's compensation payments by the employer from
either the employee or the employee's attorney is also barred.⁵

Both decisions illustrate the current state of workmen's compensation

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¹ 382 A.2d 269 (D.C. 1978).
² When the insurer makes payment on behalf of the employer, the insurer is subro-
gated to all rights of the employer under § 933(h) of the Longshoremen's & Harbor Workers'
³ 382 A.2d at 270, 274.
⁴ Nos. 227-76 & 2357-76 (D.C. Super. Ct.), appeals docketed, Nos. 13660 & 13661
(D.C. June 8, 1978).
⁵ Record at 8-9, 18, Travelers Ins. Co. v. Jones, Nos. 227-76, & 2357-76 (D.C. Super.
Ct. June 2, 1978). The *Jones* decision also raises questions about the requirement for an
employer's written consent under the Act to make an employee's settlement with a third
party effective. *See* text accompanying notes 94-127 infra.
law in the District of Columbia. As such, they raise numerous questions about the presently ill-defined relationships and duties attaching to employees, employers, third parties, and attorneys representing employees under current workmen's compensation law\textsuperscript{6} and suggest areas meriting exploration under the proposed District of Columbia Workers' Compensation Act of 1979.\textsuperscript{7}

I. The District of Columbia Workmen's Compensation Act and the Relationship of Employee, Employer, Third Party, and Employee's Attorney

Since 1928, private employees\textsuperscript{8} in the District of Columbia injured in the course of employment have been protected by the Longshoremen's and Harbor Workers' Compensation Act\textsuperscript{9} as applied to the District.\textsuperscript{10} The benefits secured under the Act seek to compensate the injured employee regardless of fault.\textsuperscript{11} As consideration for foregoing these defenses and in

\textsuperscript{6} See text accompanying notes 8-27 infra.
\textsuperscript{7} Bill 3-106, 25 D.C. Reg. 8524-89 (March 14, 1979); see text accompanying notes 128-30 infra.
\textsuperscript{8} Non-government, or private, employees in the District of Columbia, surprisingly, comprise the largest group of employees covered by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976). See 2A A. Larson's Workmen's Compensation Law § 76.43, at 176 (Supp. 1978). The Act was originally passed by Congress to provide workmen's compensation coverage for longshoremen and harbor workers such as ship repairmen and shipbuilders. See 33 U.S.C. §§ 901-902 (1976). Pursuant to its legislative power over the District of Columbia, Congress later extended the Act to cover, with certain exceptions, all employees of the private sector employed in the District. See D.C. Code Ann. §§ 36-501 to 502 (1973). As might be expected, confusion sometimes results from the application of harbor-related terminology to the more normal working environs in the District. See, e.g., 33 U.S.C. § 905(b) (1976) (refers to the exclusive liability under the Act of the stevedore (employer) and to the stevedore's non-liability to the vessel (third party) under either contract or tort theory). The question may arise whether the exclusive and non-liability provisions apply equally to the parallel relationships in the private sector in the District. See, e.g., McNeary v. Safeway Stores, Inc., No. 5895-74 (D.C. Super. Ct. Dec. 8, 1975). There is no equivalent to § 905(b) in the proposed District of Columbia Workers' Compensation Act of 1979 which may erode the District employer's exclusive liability. See note 13 infra.


\textsuperscript{9} 33 U.S.C. §§ 901-950 (1976); see note 8 supra.
\textsuperscript{10} D.C. Code Ann. §§ 36-501 to 502 (1973); see note 8 supra.
\textsuperscript{11} The Act provides that compensation shall be payable unless "the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." 33 U.S.C. § 903(b) (1976). The proposed Act of 1979
the interest of promoting compensation for injured employees, the Act releases the employer from any further liability to the employee\textsuperscript{12} or a third party.\textsuperscript{13}

The Act, however, permits, if not encourages, the employee to sue any third party responsible for the work-related injury. As a result of the 1959 amendments to section 933(a) of the Act,\textsuperscript{14} the employee no longer must...

\textsuperscript{12} 33 U.S.C. §§ 905(a), 933(i) (1976). If the employer fails, however, pursuant to §§ 932(a)(1) and (2), to secure coverage with an insurance carrier or to qualify as self-insured, then the injured employee may either recover against the employer through the normal administrative procedures under the Act, see note 11 supra, or sue the employer, who may not raise the defenses of fellow servant, assumption of risk, or contributory negligence. 33 U.S.C. § 905(a) (1976); accord, Howard v. Lightner, 214 A.2d 474, 476 (D.C. 1965). In addition, an employer who fails to comply with subsections 932(a)(1) or (2) risks imprisonment of not more than one year, or a fine of not more than $1,000, or both. 33 U.S.C. § 938(a) (1976). Identical penalties are proposed in the Act of 1979. See Bill 3-106, § 39(a), 25 D.C. Reg. 8584 (March 14, 1979).

\textsuperscript{13} 33 U.S.C. § 905(a) (1976) specifically prohibits such third parties as a spouse, parents, next of kin, or any legal representative of the employee from recovering more against the employer than provided by the Act. Under the Act, such persons only become entitled to benefits when the employee dies. See 33 U.S.C. § 909 (1976).

In addition, consistent with the employer's non-liability to third parties, courts have long recognized that a third party wrongdoer cannot seek common law contribution from an employer alleged to have been concurrently negligent in causing the employee's injury. See Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952); Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968). Various schemes developed circumventing the prohibition against contribution or indemnification. See, e.g., Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124 (1956). The 1972 amendments to the Act, however, were intended to preclude any such recovery under tort or contract theory. See 33 U.S.C. § 905(b) (1976). The effectiveness of the amendments to preclude indemnification and contribution from the employer and the ability of the third party wrongdoer to reduce the amount of the employee's judgment against the third party, where the employee is concurrently negligent, remain open to question. See 2A A. Larson, supra note 8, at § 76.43. Compare Dawson v. Contractors Transp. Corp., 467 F.2d 727, 729 n.3 (D.C. Cir. 1972) with Turner v. Excavation Constr., Inc., 324 F. Supp. 704 (D.D.C. 1971). Of interest is the recently proposed District of Columbia Workers' Compensation Act of 1979 which fails to provide any equivalent to § 905(b). Thus, if that Act passes as presently worded, indemnification and contribution demands by third parties may once again confront employers now arguably protected by § 905(b).

\textsuperscript{14} 33 U.S.C. § 933(a) (1976) provides:

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person...
choose between receiving workmen's compensation benefits or recovering damages from a third party. Accordingly, the employee may receive both workmen's compensation benefits and seek damages from the responsible third party. Under section 933(b), however, unless the employee files suit against the third party within six months of a workmen's compensation award, all the employee's rights to sue the third party are assigned to the employer.

As an assignee under the Act, the employer may either sue to recover damages against the third party or may compromise with the third party with or without filing suit. Pursuant to section 933(e), whatever recovery the employer realizes is distributed first to reimburse the employer for its litigation expenses and for all workmen's compensation benefits paid to the employee, with any excess, less one-fifth, then distributed to the employee.

The Act, however, fails to provide a distributive scheme when the employee, pursuant to section 933(b), recovers damages from the third party. To forestall double recovery by the employee and to protect the employer, courts have consistently held that the distributive scheme in section 933(e) applies, whether the proceeds result from a suit by either the employer or employee. Such reasoning comports with the Act's policy of protecting other than the employer or a person or persons in his employ is liable for damages, he need not elect whether to receive such compensation or to recover damages against such third person.

17. 33 U.S.C. § 933(b) (1976) provides in relevant part:
Acceptance of such compensation under an award in a compensation order . . . shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.
19. 33 U.S.C. § 933(e) (1976) provides, in relevant part:
Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
(1) The employer shall retain an amount equal to—
(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
(C) all amounts paid as compensation . . .
(2) The employer shall pay any excess to the person entitled to compensation . . . less one-fifth of such excess which shall belong to the employer.
20. See, e.g., Nacirema Operating Co. v. Oosting, 456 F.2d 956, 958 n.3 (4th Cir.), cert.
the employer who foregoes the normal defenses to an employee's action and who is absolutely liable to an injured employee. The Act thus fully reimburses the employer, furnishing a *quid pro quo* for accepting absolute liability. The Act further protects the employer by avoiding the inflationary impact of rising compensation insurance costs.

The employer's right to full reimbursement has usually been characterized as a "lien" interest in the third party recovery proceeds. In the evolution of third party actions, courts generally "have permitted the employer or its insurer to intervene in the employee's suit to protect its right" of first payment for its lien under the distributive scheme. In no case

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21. *See*, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953); *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975), *cert. denied*, 423 U.S. 1078 (1976) (both stating that a recognized purpose of the Act is "to protect employers who are subjected to absolute liability by the Act.").

22. *See* *Ashcraft & Gerel v. Liberty Mut. Ins. Co.*, 343 F.2d 333, 336 (D.C. Cir. 1965) ("full reimbursement of the employer . . . is an important object of congressional policy."). *See generally* cases cited in notes 20 & 21 supra.


prior to *Travelers Insurance Co. v. District of Columbia*, however, did a
court state that the employer must intervene to enforce that lien against the
third party; nor did any court, as in the subsequent case *Travelers Insur-
ance Co. v. Jones*, hold that absent such intervention the employer could
not recover its third party proceeds payments from the employee or the
employee's attorney.

II. **The District of Columbia Decision**

The same facts underlie both the *District of Columbia* and *Jones*
decisions. In March, 1973, Jones, an employee of the Southland Corporation,
was injured while making a delivery for his employer to a District of Co-
lumbia public school. Travelers, as the workmen's compensation carrier
for Southland, paid Jones' workmen's compensation benefits in the
amount of $4,254.76 without a formal award. In May and June of
1973, Travelers twice by letter notified both Jones and his attorney of its
workmen's compensation lien interest in any recovery against the Dis-
trict.

Subsequently, in July, 1973, Jones filed a personal injury action against
the District for the latter's alleged negligence causing his injury. Mrs.
Jones filed a joint claim for loss of consortium. By way of Mr. Jones' answers to interrogatories, the District admittedly learned of Travelers' workmen's compensation payments to him.

26. *See* text accompanying notes 59-72 *infra*.
27. *See* text accompanying notes 104-23 *infra*.
28. 382 A.2d at 270.
29. Id.
30. The procedures for filing a claim for benefits leading to entry of a formal award
after a hearing before a federal administrative law judge are set forth in 33 U.S.C. §§ 913 &
Formal award procedures were rendered unnecessary by Travelers' voluntary and prompt
payment to Mr. Jones.
31. Under the Act, upon payment on behalf of the employer, an insurance carrier is
subrogated to all rights and interests of the employer. 33 U.S.C. § 933(h) (1976); *see* Travel-
32. *Brief for Appellant at 5-6, Travelers Ins. Co. v. Jones, appeals docketed, Nos. 13660,
13661 (D.C. June 29, 1978).*
33. 382 A.2d at 270. As stated previously, the injured employee may file suit against a
third party within six months of a formal award. 33 U.S.C. § 933(b) (1976); *see* text accom-
panying notes 14-17 *supra*. Because Jones' suit was timely filed, Travelers was precluded
from bringing an action as assignee against the District of Columbia. *See* 33 U.S.C. § 933(b)
(1976).
34. *See* *Brief for Appellant at 7, Travelers Ins. Co. v. Jones, appeals docketed, Nos.
13660, 13661 (D.C. June 28, 1978).*
March 10, 1976).*
In February, 1974, the District settled the lawsuit without Travelers' written approval and without regard to Travelers' lien interest. According to the terms of the settlement, Mr. Jones received $1,500 while Mrs. Jones, for her loss of consortium claim, received $2,000. Both before and after settlement, communications allegedly occurred between the Jones' attorney and Travelers in which the Jones' attorney agreed to protect Travelers' lien in the settlement proceeds. In any event, Travelers received none of the settlement proceeds from any party or representative and subsequently filed suit against the District of Columbia and Mr. Jones for failure to protect its lien.

In *Travelers Insurance Co. v. District of Columbia*, the District of Columbia Court of Appeals considered, as a matter of first impression, the validity of Travelers' lien claim against the District. Travelers contended that since the District knew of its payments to Mr. Jones before settlement, the city had notice of Travelers lien interest in any settlement proceeds. Accordingly, Travelers viewed the District's failure to make its first payment to the insurance company as a failure to honor that lien, thereby rendering the city liable to Travelers in the amount of the $1,500 settlement to Mr. Jones.

In response, the District contended that section 933(b) of the Act, assigning the employee's rights against third parties to the employer only if the employee does not file timely suit, limited the extent of Travelers' rights. Thus, the District argued, since Mr. Jones filed suit within the Act's time limitation, Travelers had no substantive rights against the District and could only recover "against the employee if the employee succeeds in his third party action."  

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36. 33 U.S.C. § 933(g) (1976) requires the written approval of the employer and the insurance carrier for a settlement to be effective. See text accompanying note 98 infra.


39. 382 A.2d at 270.

40. Id. The full amount of Travelers' lien interest was $4,254.76, the amount paid by it to Mr. Jones. See text accompanying note 29 supra. However, the lien interest, if extant, attached only to the $1,500 settlement proceeds intended for Mr. Jones. The remaining $2,000 for Mrs. Jones could not be pursued by Travelers since she was not paid workmen's compensation benefits for which recoupment might be sought. The strategy to avoid the carrier's recoupment interest in Mr. Jones' recovery by paying more to Mrs. Jones is obvious. However, in *Travelers Ins. Co. v. Jones*, Travelers sued the District for the difference between the $1,500 and $4,254.76 under a different subrogation theory. See note 109 and accompanying text infra.

41. The relevant provisions of 33 U.S.C. § 933(b) (1976) are set forth in note 17 supra.

42. 328 A.2d at 271-72. As a corollary, the District argued that since Travelers was the
Although finding that, under the circumstances, section 933(b) precluded any statutorily created action by Travelers as assignee against the District,\textsuperscript{43} the court of appeals agreed with Travelers’ contention that prior law\textsuperscript{44} permitted an employer to file a nonstatutory cause of action directly against a third party.\textsuperscript{45} The court recognized, however, that an employer’s nonstatutory cause of action must nevertheless arise from an “independent wrong” committed against the employer by the third party.\textsuperscript{46}

Having disposed of that issue, the court considered whether the District had committed an independent wrong by failing to honor the equitable lien arising from Travelers’ compensation payments to Jones.\textsuperscript{47} The court

\begin{itemize}
  \item subrogee of Mr. Jones and since he received the settlement proceeds, Mr. Jones, and therefore Travelers had no further substantive rights against the District. Brief for Appellee at 4-6, Travelers Ins. Co. v. District of Columbia, 382 A.2d 269 (D.C. 1978). The court’s recognition of an employer’s independent cause of action rendered that argument meritless. See text accompanying notes 43-46 infra.
  \item 382 A.2d at 271. The court recognized that, under § 933(b), once the employee filed suit within six months, the employer could not, as the employee’s assignee, file suit. Id. at 270-71.
  \item See Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969). In \textit{Burnside}, the employer filed a counterclaim for damages based upon workmen’s compensation payments made to its injured employee against the third party who filed an action for indemnification against the employer in the event the employee successfully prevailed in his third party suit. The third party contended that § 933(b) permitted no separate cause of action by the employer absent the employee’s failure to file suit within the six month period described in § 933(b). The Supreme Court found no reason to deny such a claim for damages based upon compensation paid by the employer against the third party where the third party breached an independent duty owed to the employer. 394 U.S. at 414-15.
  \item In so doing, the court indicated its disagreement with the decision in Joyner v. F&B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971), to the extent that decision held an employer had no cause of action against a third party. 382 A.2d at 271-72. In addition, the court noted the \textit{Joyner} decision was not binding upon the District of Columbia Court of Appeals under the court reorganization act (District of Columbia Court Reorganization Act of 1970, Pub. L. 91-358 [codified in scattered sections of U.S.C.]) because it was rendered subsequent to February 1, 1971. Id. at 272. See M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971) (decisions of the District of Columbia Court of Appeals after February, 1971, are no longer subject to review by the United States Court of Appeals).
  \item 382 A.2d at 271, (quoting Federal Marine Terminals Inc. v. Burnside Shipping Co., 394 U.S. 404, 414-15 (1969)). In the lower court, the District also argued that absent a formal award to the employee under § 933(b), no employer cause of action could exist. See Brief for Appellant at 4-5, Travelers Ins. Co. v. District of Columbia, 382 A.2d 269 (D.C. 1978). The court of appeals rejected this contention, referring to Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975), \textit{cert. denied}, 423 U.S. 1078 (1976), which indicated that voluntary and prompt payment by the employer was to be encouraged. The District of Columbia Court of Appeals recognized that to predicate an employer’s non-statutory rights upon a formal award would contravene the Act’s purpose to secure prompt and voluntary payment. 382 A.2d at 272-73. In addition, an obvious contradiction would exist if, in recognizing the nonexclusivity of § 933(b), the court imposed the subsection’s limiting language upon non-statutory causes of action.
  \item 382 A.2d at 273.
\end{itemize}
first recognized that substantial authority\textsuperscript{48} justified finding an equitable lien in favor of the employer or its insurance carrier on the proceeds of an employee's recovery.\textsuperscript{49} However, the court distinguished between liens imposed on proceeds in the employee's possession and those in the possession of a third party. The court noted that such equitable liens are normally imposed upon the proceeds in the employee's possession.\textsuperscript{50} In those instances where liens have been enforced against property in the third party's possession, the court stated, without explanation, that the lien claim had been “affirmatively asserted in the settlement proceedings or litigation prior to the payment of the proceeds to the employee.”\textsuperscript{51} Therefore, the court refused to impose a lien on the proceeds in the District’s possession because Travelers knew of Jones’ suit and failed to assert its lien interest affirmatively in the settlement or litigation proceeding prior to payment. Apparently, Travelers’ knowledge precluded any justification for its failure to assert its lien interest.\textsuperscript{52}

The court also decided that in cases such as District of Columbia—where a third party suit was pending—the only acceptable affirmative assertion of a lien against proceeds in a third party’s possession was the employer’s formal intervention.\textsuperscript{53} The primary rationale was to protect the third party from a second suit by the employee for wrongful payment.\textsuperscript{54} The court, however, admitted that the ability to force the employer-intervenor to settlement in court also justified intervention.\textsuperscript{55}

The court’s analysis is subject to question because it ignores the underlying justifications for imposing a lien on proceeds from a third party recov-

\textsuperscript{48} Id. at 273-74; see cases cited therein and note 23 supra.

\textsuperscript{49} 382 A.2d at 274.

\textsuperscript{50} Id. The court's observation is critical to the analysis of the holding in Travelers Ins. Co. v. Jones that an employer must intervene to assert a lien on the proceeds in the employee's possession. See text accompanying notes 94-127 infra.

\textsuperscript{51} 382 A.2d at 274.

\textsuperscript{52} The court stated: “no lien claim was affirmatively asserted here by Travelers prior to the payment of the asserted proceeds to the employee Jones, even though Travelers was aware of Jones' suit. We find this distinction controlling in our disposition of the case . . . .” Id.

\textsuperscript{53} Specifically in support of requiring intervention, the court stated, “Only if Travelers had intervened and affirmatively asserted a right to the settlement proceeds . . . could the District be protected in paying Travelers.” 382 A.2d at 274. The intervention required is apparently that provided for by Superior Court Rule of Civil Procedure 24.

\textsuperscript{54} See note 53 supra.

\textsuperscript{55} 382 A.2d at 274 n.7. The court quoted rather remarkable language employed by the lower court concerning its preference for applying settlement pressure on the employer to accept less for its lien interest, stating: “it's rather difficult for [the trial court] to take a non-party back in the chambers and crank up the 'sweat box' to get the case settled.” Id. (quoting Record at 12).
ery: protection for the employer and prevention of an employee's double recovery. Accordingly, because proceeds will be distributed similarly regardless of whether the suit is instituted by the employer or employee, the lien should be effective against the proceeds in the third party's possession notwithstanding the employer's intervention in an employee's suit. Although courts in the District have not previously addressed this argument directly, decisions in the District and elsewhere interpreting the Act and similar laws support such a contention.

In a remarkably similar case decided before the District of Columbia decision, a New York appellate court, in Jarka Corp. v. Fireman's Fund Indemnity Co., squarely confronted the issue of whether intervention by the employer in a pending third party action is required. As in District of Columbia, the employer made compensation payments under the Longshoremen's and Harbor Workers' Compensation Act without a formal award. The employee then sued the third party allegedly responsible for his injury. The employer notified the third party of the payments and its desire for reimbursement before commencement of the employee's action. The third party, however, settled the action and paid the entire proceeds to the employee. The employer sued the third party for reimbursement. The court held that intervention was not essential to secure first payment to the employer "so long as there was notice to the tort-feasor of the employer's advances." Although the employer had notified the third party both of the payments and its desire for reimbursement, the court required only that the third party be notified of the payments for the employer's advances.

56. See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 412 (1953); Louviere v. Shell Oil Co., 509 F.2d 278, 283-84 (5th Cir. 1975), cert. denied, 423 U.S. 1078 (1976) (a recognized purpose of the Act is "to protect employers who are subjected to absolute liability by the Act . . ."); Potomac Elec. Power Co. v. Wynn, 343 F.2d 295, 298 (D.C. Cir. 1965) ("[t]he employer's interest in recoupment, if the employee ultimately succeeds in recovering from the third party, would presumably be protected by a lien on the proceeds"); Ashcraft & Gerel v. Liberty Mut. Ins. Co., 343 F.2d 333, 336 (D.C. Cir. 1965) ("full reimbursement of the employer . . . is an important object of congressional policy").

57. Nacirema Operating Co. v. Oosting, 456 F.2d 956, 958 n.3 (4th Cir.), cert. denied, 409 U.S. 980 (1972); Davillier v. Cavn Venezuelan Line, 407 F. Supp. 1234, 1237 (E.D. La. 1976); see cases cited therein and in note 23 supra. The court failed to address the policies favoring the employer, discussed in the text accompanying notes 61-63 infra.

58. See notes 19-23 and accompanying text supra.


60. 286 App. Div. at 149, 142 N.Y.S.2d at 369-70.

61. 286 App. Div. at 149, 142 N.Y.S.2d at 370. The court cited earlier federal cases recognizing the applicability of the § 933(e) distributive scheme even though the employee brings suit. Id. See note 19 supra.

ployer to prevail. Thus, in District of Columbia, in which the District of Columbia received actual notice of Travelers' payments through Mr. Jones' answer to interrogatories, both equity and legal precedent argue for a similar result.

More recent federal cases support this conclusion while recognizing the employer's right to satisfy its lien interest from the third party without requiring intervention. In Russo v. Flota Merconter Grancolombiana, for example, the United States District Court for the Southern District of New York considered an employee's objections to an employer's right to first payment from proceeds which the third party sought to deposit with the court. The court rejected the employee's suggestion that the employer must intervene. According to the court, requiring intervention when other parties had notice of the lien "would sacrifice substance for form." Implicitly, the court recognized the well established existence of an employer's lien interest in the proceeds in any party's possession. As in Jarka, the court intimated that so long as the third party had notice of the employer's payments, and hence of its lien interest, equity dictated first payment to the employer.

Russo was cited with approval by the United States Court of Appeals for the First Circuit in Cella v. Partenreederei MS Ravenna, in which the court stated that formal intervention is not required to protect the employer's lien. The employer in that case sent notice of its lien to both the third party and the employee. Apparently, the court deemed the notice effective. Similarly, the Fifth Circuit in Albert v. Paulo permitted an employer to file a "notice of payment" without formal intervention to protect the lien. The court outlined no requisite procedure to enforce the lien

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63. The request for reimbursement was not expressly mentioned as a requirement or a factor in the decision. *Id.*
64. See text accompanying note 39 supra.
65. 303 F. Supp. 1404 (S.D.N.Y. 1969). In Russo, the employer's right to reimbursement seemed to be uncontested by the third party. Knowledge by the employee's attorney of the employer's interest apparently was also sufficient to require the employee to permit the proceeds to be paid first to the employer. *Id.* at 1406.
66. *Id.*
67. In support of its position that intervention was required, the court cited Ballwanz v. Jarka Corp., 382 F.2d 433 (4th Cir. 1967), and Riddick v. Rederi A/B Fredrika, 271 F. Supp. 360 (E.D. Va. 1967), where the courts recognized imposition of the lien before distribution to the employee. Thus, the lien effectively arose on the proceeds in the third party's possession.
69. 529 F.2d at 19.
70. *Id.* at 17, 19.
71. 552 F.2d 1139 (5th Cir. 1977).
but merely permitted the filing without requiring formal intervention.\textsuperscript{72} 

Although the case law recognizes that actual notice should obviate the need for intervention, the kind of notice required to impose the duty on third parties to protect the employer's lien remains uncertain. In those cases in which the source of notice was identified, it was usually found to be an employer's letter to the third party.\textsuperscript{73} There was, however, no indication that the employer would be any less protected if the third party received notice of the employer's interest from another source. Thus, when the third party receives notice of the employer's payments to the employee and thus of the employer's lien interest as in District of Columbia, the employee's answers to the third party's interrogatories will furnish notice sufficient to place a duty on the third party to protect the employer. Whether notice is received directly from the employer or arises from the litigation with the employee, the third party clearly knows of the employer's interest.\textsuperscript{74} 

In the cases discussed above, the employer knew of the employee's suit against the third party. In contrast to District of Columbia, however, intervention was not required. Despite precedent to the contrary, the District of Columbia court offered two justifications, besides the notice issues, for requiring intervention: to free third parties, who pay the employer first, from suits by employees, and to facilitate settlement by forcing the employer to accept less for its lien, thus terminating the employee's third party suit more quickly.\textsuperscript{75}

\textsuperscript{72} Id. at 1140. 
\textsuperscript{73} See text accompanying notes 67-72 supra; 74-79 infra. 
\textsuperscript{74} Similarly, since the lien is a creation of the courts as a matter of law in interpreting the Act's policy favoring the employer who has compensated its injured employee, perhaps no notice is required. See note 23 supra. In jurisdictions such as New York, where the lien arises by statute, notice to the third party is not required to render the third party liable. Utica Mut. Ins. Co. v. Employers Mut. Ins. Co., 57 Misc. 2d 764, 766, 293 N.Y.S.2d 735, 738 (1968). Although under the Act, the lien is a common law creation, no justifiable distinction can be made between it and the lien created by statute. The policy to protect the employer, prevent double recovery, and lower costs of the compensation system supports the protection of the lien interest however created. 

Interestingly, the District of Columbia Merit Personnel Act, in providing a new compensation system for persons employed by the District, requires no notice to the third party for reimbursement to the District and states: "No court, insurer, attorney or other person shall pay or distribute to the beneficiary or his or her designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the District of Columbia . . . ." District of Columbia Government Comprehensive Merit Personnel Act of 1978, Law 2-139, § 2332, 25 D.C. Reg. 5740, 5982 (Supp. I 1978) (effective March 3, 1979). However, whether by oversight or intention, the proposed District of Columbia Workers' Compensation Act fails to incorporate any such provision. Instead the proposed Act follows the exact wording of § 933 of the existing Act. See text accompanying notes 129-31 infra.

\textsuperscript{75} See text accompanying notes 59-60 supra.
As to the first matter, the court relied upon the 1959 amendment to the Act which permits an injured employee to receive compensation benefits and also to sue the third party if the suit is brought within six months after a compensation award. Without reference to other supporting authority, the court concluded that, as a result of the amendment, the third party could believe that only the employee had a cause of action against it under the Act's provisions.

This position, however, apparently contradicts controlling law in the District. In *Potomac Electric Power Co. v. Wynn*, the United States Court of Appeals for the District of Columbia Circuit had previously considered the reverse situation. An employee failed to sue a third party until after six months had elapsed following his compensation award. The third party argued that, under the Act, because the employee failed to file suit within six months, the right to file suit was completely assigned to the employer. Apparently, as in *District of Columbia*, the third party knew that the Act gave the employer the right to sue. Thus, the third party feared double recovery. The court of appeals accurately responded that "[t]he statute is not designed to protect third parties." Furthermore, the court stated that any fear of double recovery was alleviated by the lien interest of the employer in any proceeds received by the employee, thus avoiding the possibility of an employer's separate suit against the third party.

The employer's lien interest, as directly inferred in *Wynn*, was 

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76. See text accompanying notes 15-16 supra.
77. 382 A.2d at 274.
78. 343 F.2d 295 (D.C. Cir. 1965). Since the *Wynn* decision antedates the operative date of the court reorganization, it is controlling law in the District. See M.A.P. v. Ryan, 285 A.2d 310 (D.C. 1971).
79. 343 F.2d at 296.
80. Id. at 298. The Act's purpose is to define and limit the rights and duties of the employee and employer, and therefore, the third party is not an intended beneficiary of the Act. See text accompanying notes 13-28 supra.
81. 343 F.2d at 298. Despite the apparent precedent laid down in the *Wynn* decision, the District of Columbia court neither cited nor distinguished it in reaching its opposite result. Moreover, this deviation cannot be justified on the basis of the two considerations enunciated in *Wynn* — namely that the Act was not designed to protect third parties, and that the courts should protect against employees receiving double recovery. Notably, since Jones was not entitled to full payment, the District could have no realistic fears of a second suit by Jones for failure to make full payment to him.
82. Id. The court stated:

A further important purpose of the statutory assignment is to 'safeguard' the employer's right of recoupment 'where a claimant [compensated employee] does not pursue a good third party action . . . .' This purpose does not require us to penalize the employee if the employer-assignee declines to sue the third party. In effect, the employer's declination amounts to a waiver of the protection afforded by the statutory assignment. Moreover, the employer's interest in recoupment, if the em-
paramount to the interest of the employee in the proceeds. This reasoning comports with that of other courts which have noted the failure of the Act's amendments to alter the existing court-imposed distributive scheme in favor of the employer's lien even when the employee files the third party suit.83

Similarly, the District of Columbia court's attempt to force an employer to accept less for his lien by requiring intervention and then applying settlement pressure84 conflicts with other court decisions. Interestingly, once again the court of appeals cited no case or statutory authority to support its position.85 The court, however, obviously hoped to settle third party actions more quickly by forcing employers, through persuasion by the trial judge, to accept less for their lien interests, thereby permitting a larger recovery for the employee out of the settlement with the third party. The employee would thus more readily accept a given offer of settlement if less of it were owed to the employer.86

Although the district courts had not expressly considered the matter previously, the Second Circuit in Landon v. Lief Hoegh & Co.,87 rebuffed a similar argument. In Landon, the argument was raised that unless an employer's lien was subject to the defense of the employer's contributory negligence, it would be more difficult to force the employer to settle his lien claim for a lesser amount. The Second Circuit recognized some practicality of the argument but nevertheless reasoned that many considerations required congressional action to implement such a policy.88 Although the

employee ultimately succeeds in recovering from the third party, would presumably be protected by a lien on the proceeds . . .

Id. (footnotes omitted).

83. See Ashcraft & Gerel v. Liberty Mut. Ins. Co., 343 F.2d 333, 336 (D.C. Cir. 1965) ("[w]hat Congress did do in the 1959 amendments was simply to say that, if the employee sued, the employer's compensation liability would be restricted to any excess of that liability over the amount recorded. . ."). See also Albert v. Paulo, 552 F.2d 1139, 1141 n.3 (5th Cir. 1977); Landon v. Lief Hoegh & Co., 521 F.2d 756, 763 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976); Cella v. Partenreederei MS Ravenna, 529 F.2d 15, 19 (1st Cir. 1975), cert. denied, 425 U.S. 975 (1976). See note 20 supra.

84. See text accompanying notes 60-61 supra.

85. 382 A.2d at 274.

86. Id.


88. The Second Circuit stated:

The appellant makes the practical argument that under . . . [the lower court's] decision it will be more difficult for . . . [third parties] to settle . . . [employee] cases, since there is no incentive on the . . . [employer] (or its carrier) to reduce its compensation lien to help the settlement if it is not subject to the defense of concurrent negligence. That may be true in some cases, but it is only one consideration in the whole congeries of relations involved and should be addressed to Congress.

521 F.2d at 763 n.10.
Second Circuit did not specifically identify the considerations to which it was alluding, it referred by implication to the following policies underlying the Act: protection of the employer rather than the third party, reimbursement of the employer, and protection of the employer's lien to avoid inflationary increases in compensation insurance costs absent such protection. These policy considerations similarly apply in attempting to force the employer into court for settlement pressure purposes. Therefore, absent authority from Congress, courts should not impede protection of the employer's lien interest by procedural or coercive measures.

III. The Jones Decision

Travelers Insurance Co. v. Jones was based upon the same facts underlying the District of Columbia case. In Jones, the District of Columbia Superior Court considered the liability of the employee, the employee's attorney, and the third party to Travelers. The court found that absent intervention by Travelers in the third party suit by Jones against the District, neither Jones nor his attorney would be liable to Travelers for any failure to reimburse Travelers for its workmen's compensation payments to Jones. Travelers also utilized Jones to bring a second action against the District based upon the absence of Travelers' written consent to the settlement between Mr. Jones and the District, as required by the Act. The

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89. See 521 F.2d at 762.
90. See Potomac Elec. Power Co. v. Wynn, 343 F.2d 295, 298 (D.C. Cir. 1965) ("The statute is not designed to protect third parties from suit ... "). See also text accompanying note 80 supra.
91. See notes 60-62 supra and accompanying text.
92. See note 23 supra and accompanying text.
93. Questions remain as to whether the District of Columbia court, in dictum, was correct in requiring an employer otherwise to "assert affirmatively" its lien interest against the third party absent a pending third party suit. 382 A.2d at 274. See text accompanying notes 55-58 supra. The same policies underscoring the inadvisability of requiring intervention where a third party suit is pending apply. Absent the employer's express waiver of its interest, see Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975), a third party, with notice of the employer's interest, should be liable for failure to protect the employer's interest in light of the underlying policies favoring the employer. See text accompanying notes 80-92 supra.
94. See text accompanying notes 32-42 supra. The Jones case was both a continuation of Travelers' first suit against Jones after consolidation and a new suit filed against his attorney and against the District. The second suit against the District was by permission of the court in dismissing the first action. See note 96 infra.
96. In the first action against the District of Columbia, which led to the appellate decision in Travelers Ins. Co. v. District of Columbia, 382 A.2d 269 (D.C. 1978), the trial court dismissed the action with leave to file a second suit based upon Travelers' "subrogation rights" against the District. Record at 15.
superior court held that Travelers had no such cause of action.\textsuperscript{97}

In Jones, Travelers sought full reimbursement from Mr. Jones for the $4,254.76 paid as compensation benefits to him.\textsuperscript{98} First, as to the $1,500 of that amount, Travelers argued that its lien entitled it to reimbursement for its prior payments out of the employee’s third party recovery against the District of Columbia.\textsuperscript{99} As to the remainder, Travelers contended that, under the Act, it was liable for benefits to the employee for any excess over a third party settlement only if its written consent to the settlement was obtained.\textsuperscript{100} Since such consent was not obtained, Travelers argued that the employee was not entitled to the excess and must repay the benefits to Travelers.

In opposition, Jones argued that District of Columbia required the employer or its carrier to intervene in the third party suit to assert its lien. Since Travelers did not intervene, Jones contended it was not entitled to recover any amount. Apparently relying solely on the District of Columbia case, the court agreed with Mr. Jones’ argument and granted his motion for summary judgment. In an oral ruling from the bench, the court offered no further rationale for its holding other than to state that District of Columbia required intervention for the employer or carrier to assert its recoupment interests against any party, not just third parties.\textsuperscript{101}

It is clear, however, that the superior court misinterpreted District of Columbia. The intervention required in that case referred only to enforcing the lien against the proceeds in the third party’s, and not the employee’s, possession.\textsuperscript{102} In fact, the District of Columbia court specifically stated that in situations when the employer or carrier does not intervene, the lien “is

\begin{itemize}
  \item \textsuperscript{98} For a discussion of the facts in Jones, see text accompanying notes 28-38 supra.
  \item \textsuperscript{99} See note 24 supra.
  \item \textsuperscript{100} 33 U.S.C. § 933(g) (1976) provides:
    If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter the employer shall be liable for compensation . . . [in excess of the amount recovered against the third party] . . . only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.
  \item \textsuperscript{101} See Record at 8-9, 18, Travelers Ins. Co. v. Jones, Nos. 227-76, 2357-76 (D.C. Super. Ct. June 2, 1978). The court made no distinction between the $1,500 and the excess amount that Travelers sought.
  \item \textsuperscript{102} 382 A.2d at 274; see text accompanying note 50 supra.
\end{itemize}
Workmen's Compensation Liens

placed on property in the hands of the employee." Further, legal precedent provides ample support for requiring reimbursement to the employer from the employee without intervention. The United States Court of Appeals for the District of Columbia Circuit has explicitly held that "any third party recovery which is less than the total amount of compensation already paid, or to which the employee is entitled, inures to the benefit of the employer and its insurance carrier."

Similarly, requiring repayment to the employer of the amount in excess of the $1,500 settlement has a sound legal basis. As the District of Columbia Circuit stated in Ashcraft & Gerel v. Liberty Mutual Insurance Co., the employer's compensation liability is restricted to any excess over the amount received from the third party. The subsequent decision in Morauer & Hartzell, Inc. v. Woodworth, however, recognized that section 933(g) requires the employer's and insurer's written consent to permit the recovery of the benefits described in Ashcraft. As the Supreme Court stated in dismissing certiorari in Woodworth, "an employer is not obligated to pay compensation to the employee" absent such consent. Therefore, contrary to the superior court's holding, Jones was liable to Travelers for the entire amount paid to him. In light of the fact that Travelers was precluded by section 933(b) from bringing its own action against the District, holding Jones liable for failure to obtain Travelers' consent seems only equitable.

Likewise, the basis for the second suit against the District of Columbia was premised upon the failure to obtain Travelers' written consent to the settlement between Jones and the District as required by the Act. Under similar facts, the Fourth Circuit held in Liberty Mutual Insurance Co. v. Ameta & Co. that, absent such written consent by the employer, a release from the employee does not protect the third party from a recoup-

103. 382 A.2d at 274.
104. See notes 24, 56, 65, 67 supra.
106. 343 F.2d 333, 336 (D.C. Cir. 1965).
108. McClanahan v. Morauer & Hartzell, Inc., 404 U.S. 16 (1971). The Act's policy favoring voluntary and prompt payment supports recoupment by the employer or carrier where after receiving such payment the employee prejudices the employer's or carrier's recoupment interest by settling the third party claim without consent. See 382 A.2d at 273.
109. See text accompanying note 96 supra.
110. 564 F.2d 1097 (4th Cir. 1977).
ment suit by the employer. Such a holding comports with the intent of the Act to protect the employer's recoupment interest and to limit its liability to only those benefits in excess of the third party recovery. Otherwise, the employer will obviously be doubly prejudiced if the employee settles with the third party for a small amount. Should this occur, the employer's recoupment lien will attach to a smaller amount, forcing the employer to pay more benefits.

In support of its reasoning, the superior court relied on case law since repudiated by the court of appeals in District of Columbia, holding that the Act does not permit a separate claim by the employer or its carrier against the third party once the employee has filed suit against that party under section 933(b). As the District of Columbia court concluded, however, section 933(b) does not provide the sole remedy for an employer against a third party in all cases. Thus, the superior court erred in assuming the carrier had no right of action against the District.

Finally, as to its action against Mr. Jones' attorney, Travelers did not rely upon either its lien interest or the failure to obtain its written consent under the Act. Instead, it asserted a simple breach of contract ac-
tion. Both before and after settlement, communications occurred between Travelers' and Mr. Jones' attorney in which the attorney, according to Travelers, acknowledged both Travelers' lien and the responsibility to protect it. Accordingly, Travelers argued that the attorney explicitly or impliedly agreed to protect its lien and breached that agreement by the failure to do so.118

As in the action against Mr. Jones, the lower court granted summary judgment for the attorney, reasoning that District of Columbia required the employer's intervention in the third party suit before holding any other party liable for repayment of the third party proceeds.119 Although Travelers argued that the District of Columbia decision concerned only the enforceability of the employer's lien against a third party and not the contractual issues presented, the court, "out of an abundance of caution" concerning the court of appeals' holding, dismissed the action.120

Nonetheless, District of Columbia only considered the limited issue of the employer's lien and a third party, rather than any other issues concerning other parties such as the employee or the employee's attorney. In fact, the District of Columbia Court of Appeals in an analogous case, Heffelfinger v. Gibson,121 previously held that a doctor had an actionable claim for breach of an implied contract by an attorney who failed to pay the doctor first out of settlement proceeds for services rendered as agreed. In Heffelfinger, the attorney originally handling the case signed an agreement to pay the doctor's fees for reports concerning his diagnosis and prognosis for the attorney's injured client. The case was subsequently transferred to another attorney who was notified of the duty to pay the doctor first out of any recovery. The doctor did not receive his fee from the recovery subsequently obtained. In sustaining the doctor's recovery against the original attorney, the court noted that the subsequent acknowledgement to the second attorney concerning the duty to pay the doctor constituted an implied

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119. See text accompanying notes 106-08 supra. As to a third party, such as the District, liability to the employer is premised upon the fact that a release by a subrogor (the employee) does not release the third party from liability to the subrogee (the employer absent the latter's knowledge or consent). See text accompanying notes 109-13 supra. As to the attorney, absent fraud, a parallel theory of recovery does not appear to exist. Cf. note 116 supra.
118. See note 108 supra and accompanying text.
promise to pay.\textsuperscript{122} Similarly, in \textit{United States v. Limbs}, a federal district court held that in the workmen's compensation context, an attorney may be liable under proper circumstances for breach of an implied contract if he fails to reimburse the employer.\textsuperscript{123} In \textit{Limbs}, however, the court found that a specific denial by the attorney during the third party suit prevented any implied contract from arising.\textsuperscript{124}

Since the compensated employee is not entitled to the entire third party recovery,\textsuperscript{125} there is no real conflict of interest in requiring the attorney to protect the employer's interest. In fact, recent decisions hold that the employee's attorney is entitled to a fee out of the employer's recoupment interest in the employee's third party recovery.\textsuperscript{126} Thus, the attorney is arguably under a duty to protect the employer who is actually paying the attorney a fee to do so. If no fee is taken, however, the existence of a duty to pay remains uncertain, and the responsibility for payment will depend upon the circumstances presented.

Thus, the superior court should have considered Travelers' claim against the attorney. Under the proper circumstances, an employee's attorney should be responsible to protect the employer's lien interest. The failure of the employer to intervene has no rational relationship to the contractual or legal issues involved. Although the attorney argued in the superior court that no such communications ever occurred, this merely created an issue of material fact. In light of this, summary judgment was inappropriate. The court's emphasis upon the \textit{District of Columbia} decision, however, completely overshadowed the factual issues presented concerning the breach of an implied contract.\textsuperscript{127}

\section*{IV. Workmen's Compensation Law in the District under the Proposed New Act and under the \textit{District of Columbia} and Jones Decisions}

What then is the present state and foreseeable future of the law in the District of Columbia with respect to the relative rights and duties of parties actually or potentially involved in workmen's compensation cases? The proposed District of Columbia Workers' Compensation Act of 1979,\textsuperscript{128} as

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} at 394.
  \item \textsuperscript{123} 356 F. Supp. 1004, 1015 (D. Ariz. 1973), \textit{aff'd in relevant part}, 524 F.2d 799 (9th Cir. 1975).
  \item \textsuperscript{124} 356 F. Supp. at 1012.
  \item \textsuperscript{125} \textit{See} notes 21 & 22 \textit{supra}.
  \item \textsuperscript{126} \textit{See, e.g.}, Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978); Valentino v. Richners Rhederei, G.M.B.H., SS Etha, 552 F.2d 466 (2d Cir. 1977).
  \item \textsuperscript{127} \textit{See} text accompanying notes 116-18 \textit{supra}.
  \item \textsuperscript{128} \textit{See} proposed Bill 3-106, 25 D.C. Reg. 8524-89 (March 14, 1979).
\end{itemize}
presently worded, will have no effect upon the issues raised in the District of Columbia and Jones cases. Unlike the present workmen's compensation acts for United States and District government employees and the no-fault provisions of the proposed Motor Vehicle Accident Victim Protection Act of 1979, the private employer or insurer is not given any more protection than it currently enjoys for its lien interest in third party proceeds in the hands of other parties. The proposed compensation act merely incorporates the language of the present Act's section 933 with respect to the relative rights and duties of the employer and employee. Thus, it will not be likely to affect previous court interpretation and extrapolation of section 933's provisions with regard to third parties' and attorneys' liability to the employer or insurer.

Clearly, under the District of Columbia decision, if the employer knows of the pending third party action it must intervene to protect its right of first payment from the third party. Other situations with regard to third parties are not as clear. If the employer knows that the employee intends to file suit against a third party or is presently engaged in settlement negotiations with a third party, then the safest procedure for the employer is to notify the third party by registered letter of its lien and desire for reimbursement out of any settlement proceeds. Obviously, an employer cannot formally intervene in a third party action until after a suit is filed. Therefore, the notification procedure outlined above would seem to comport with the court of appeals' apparent requirement to "otherwise affirmatively assert" the lien if no litigation is pending. If the employer does not know of any pending or anticipated third party action or negotiation proceedings, again the most secure route is for the employer to notify by registered letter all potential third parties about whom it has any knowledge.

As to the employee's attorney, the employer again should request the agreement of the attorney to protect its lien by registered letter. The attorney's agreement should be in writing. If, after the employer sends the let-

129. Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1976). In regard to the relevant change in 1974 imposing the duty on attorneys and other persons to protect the government's lien, see note 116 supra.


131. See Bill 3-36 § 9, 25 D.C. Reg. 6879 (Supp. 1 1979) (introduced January 11, 1979). Under that section the insurer is to be reimbursed out of any third party recovery automatically by the injured insured, and by the third party with notice of the insurer's recoupment interest.

132. See 382 A.2d at 274.
ter to the attorney, the attorney refuses to respond or to agree, then the employer has done all it can. The attorney, however, is arguably liable to the employer if he fails to protect the lien since recent decisions state that the attorney is entitled to a fee out of the employer’s part of the third party recovery. If no fee is taken, the situation remains unclear and depends upon the circumstances presented.

As to the employee, Jones contradicts overwhelming authority and will no doubt be reversed on appeal. Even the District of Columbia decision stated that the employer’s lien is enforceable against the employee absent intervention or other affirmative action by the employer. Unless the employer expressly waives its right of reimbursement, the compensated employee must be liable to the employer for failure to reimburse promptly the employer’s interest. The employee who is compensated receives all the Act intends to provide. To the extent the employee recovers more from the third party than the employee received in compensation payments, the employee rightfully retains that amount. In exchange for such equitable treatment, however, the other beneficiary of the Act, the employer, must be protected by imposing the duty to reimburse upon the employee even if the employer does not intervene, or otherwise assert its lien. To require otherwise would make a sham of the compensation system.

133. See note 126 supra.
134. See text accompanying note 103 supra.
135. See 382 A.2d at 273-74 n.6; Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975).
136. See notes 22, 24 supra.