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ILLINOIS LAW MANUAL

CHAPTER IX SPECIAL DEFENSES

B. SETOFF

A setoff is a credit that a defendant receives on a judgment entered against him. This is most often from payment by a co-defendant who has settled with the plaintiff before judgment. (See Chapter III, Section A). Because Illinois does not allow double recovery, the settlement amounts paid to a plaintiff by any defendant will reduce the damages recoverable from the defendants who remain in the case.

If a defendant settles with the plaintiff before judgment, the amount of that settlement will be deducted from the damages recoverable from the other parties whose tort liability arises from the same circumstances. This right of setoff exists whether the payment was made before or after judgment. The person or party who makes the payment need not be a party to the suit.

In Eberle v. Brenner, 153 Ill. App. 3d 700 (4th Dist. 1987), a worker was injured in a job-related accident and was awarded a \$56,000 verdict against a product manufacturer. This verdict was reduced by 50% as a result of the worker's comparative negligence. Before trial, a hospital that may have aggravated the plaintiff's injuries due to alleged malpractice paid \$18,000 to settle the claim against it. The \$56,000 judgment was reduced by \$28,000 (for plaintiff's own negligence) and then by an additional \$18,000 (the amount of the hospital's settlement). To allow the plaintiff to keep the settlement payment from the hospital while requiring the manufacturer to pay the entire amount of the judgment against it would have allowed the plaintiff an impermissible double recovery. The manufacturer paid only \$10,000 of the \$56,000 judgment.

It is important to recognize the distinction between the right to a setoff and payments made to a plaintiff by a collateral source, such as reimbursements for medical expenses by a health care plan, disability benefits, or workers' compensation benefits. Usually, the payers of these benefits retain for themselves a right of subrogation and will typically serve a notice of lien in a claim against a third-party tortfeasor. The plaintiff will ordinarily be required to reimburse these payers for the benefits received. The benefit amounts are not set off, or credited to, a judgment entered against a defendant. Gonzalez v. Evanston Fuel & Material Co., 265 Ill. App. 3d 520 (1st Dist. 1994).

If a plaintiff's employer is sued for contribution by another defendant and the employer has paid workers' compensation benefits to the plaintiff, the non-settling defendant is entitled to a setoff for the full amount of workers' compensation benefits paid to the plaintiff, or to be paid to the plaintiff/employee in the future. However, the setoff occurs only if the employer waives the entire amount of its lien in exchange for settlement and dismissal of the contribution action against it. Wilson v. Hoffman Group, Inc., 131 Ill. 2d 308 (1989).

The workers' compensation lien will act as a setoff if:

- (1) the employer was sued in a third-party complaint for contribution by a defendant directly sued by the plaintiff-employee; and

- (2) the employer settles the third-party complaint and obtains a release in exchange for the waiver of the workers' compensation lien.

The Supreme Court in Wilson made no comment as to the required standard of proof to show that a settlement was made in good faith. The Supreme Court has since spoken regarding the standard of proof required to show that a settlement was not in good faith. In Johnson v. United Airlines, et al., the Supreme Court held:

. . . once a preliminary showing of good faith has been made by settling parties, the party challenging the good faith settlement need prove the absence of good faith by a preponderance of the evidence.

Johnson v. United Airlines, et al., 203 Ill. 2d 121 (2003).

Under the terms of the Contribution Act, a release or covenant not to sue, given in good faith to a defendant liable in tort arising out of the same injury, reduces the recovery against other defendants liable for the same injury by the amount of the settlement. 740 ILCS 100/2. Payments made by one defendant, either before or after judgment, diminish the plaintiff's claim against all others responsible for the same harm.

The amount that will be set off is the amount of the payment, not the amount of the settling defendant's proportionate share of the total liability to the plaintiff. For example, a defendant settles with a plaintiff before trial for his policy limit of \$50,000, but is found to be responsible for 60% of the plaintiff's damages (which a jury determines are \$500,000). The remaining defendant at trial, although found 40% liable, is entitled only to a credit of \$50,000 and is obligated to pay \$450,000 to satisfy the judgment. (See Chapter I, Section H for a discussion of Joint and Several Liability.)

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