INFORMAL COMMENTARY ON EMPLOYER 'CONTRIBUTION' IN 3RD PARTY WC LITIGATION.

NOTE: Ed Dutton, Director of Claims and Legal Services with the Park District Risk Management Agency (PDRMA) in Lisle, IL provided the following informal commentary to AGRIP on May 7, 2003. This was his quick response to an AGRIP inquiry regarding proposed legislation in Texas that would subject Texas employers, including public entities, to "negligence contribution" in third party litigation related to an employee's workers' compensation injury.

This issue—the availability and the extent of recovery against an allegedly negligent employer of an injured employee who has sued another party—has been wrestled with in every state as far as I know. A good (if now somewhat dated) discussion of the issues can be found in the Illinois Supreme Court's opinion in Kotecki v. Cyclops Welding Corp., 146 Ill. 2d 155, 585 N.E. 2d 1023 (1992). In that case the court surveyed the law in all 50 states at that time and decided to follow the "Minnesota Rule": an employer which is found negligent in causing or contributing to cause the employee's injury will be liable to contribute to the judgment assessed against the direct defendant, but the amount of the employer's contribution will be capped at the amount of the employer's worker's compensation liability.

In Illinois an employee is generally barred by statute from suing his/her employer directly in tort. This is called the "exclusive remedy" provision of the worker's compensation act. In exchange for the employee statutorily giving up any common law tort action against the employer, the employee obtains the protections of the worker's compensation statute: e.g., no fault recovery, prompt and certain compensation for injuries arising out of the employment, etc. The injured employee can still sue a negligent defendant directly in a common law action, and that defendant can (and often does) file a third party contribution action against the employer of the injured employee. This is where the so-called "Kotecki cap" kicks in: the employer can be held liable in contribution to the direct defendant (in an amount to be apportioned by the jury), but that amount will be capped at the amount of the employer's worker's compensation liability (i.e., the amount of the worker's compensation lien—the total of the medical payments, lost time, permanency payments, etc. which the employer has or will be required to pay as worker's compensation to the injured employee under the worker's compensation statutory scheme).

The rationale for allowing the direct defendant to seek (by way of a third party contribution action) to apportion some or all of the fault to the plaintiff's employer is that the direct defendant would otherwise be stuck paying for damages which were caused by the wrongful acts or omissions of the employer. But the amount of that apportionment is capped at the employer's worker's compensation liability.

With regard to governmental employers, the liability picture (for contribution) has an additional twist. First, Illinois law treats the state differently from local units of government. If the state itself is the employer, the state can only be sued in the Court of Claims (which is staffed by administrative law judges who are appointed by the governor) and the statutory cap on damages is set at a mere $100,000. For local public entities in Illinois, there is no cap on recoverable damages and those entities can be sued in the circuit courts. However, the legislature has adopted a relatively broad tort immunity act and provisions of that act can serve to bar contribution actions (e.g., for negligent supervision of the injured employee). See, e.g., Epstein v. Chicago Bd. of Education, 178 Ill. 2d. 370, 678 N.E. 2d 1042 (1997)(Local public entity statutorily immune from tort liability for allegations of failure to properly supervise or instruct subcontractor's employee on construction project).