

Admiral Manufacturing makes oversized novelty belt buckles that feature an assortment of themes, ranging from four leaf clovers to sports teams, particularly New York sports teams, as Admiral is located within New York City. To make the buckle, molten metal is injected into two halves of a die held together by hydraulic presses. After the metal is injected, the presses are released and the buckle is removed by the machine operator.

Francis is a new employee of Admiral; after about an hour of training on his first day, his assignment is to operate one of the production machines. With virtually no experience, Francis's first days are a disaster – his output is far below what is expected. To speed things up, the shop supervisor directs Francis to remove the protective guard that encloses the die during injection of the molten metal.

On the fourth day of production, the dies of the machine do not close properly, resulting in a spray of molten metal that hits Francis directly in the face, causing serious burns in and around his eyes.

Workers' Compensation Upon report to Admiral's Human Resource department, Francis begins to receive payment of workers' compensation benefits by Admiral's workers' compensation insurer – including paying for his medical treatments and lost wages. What is immediately apparent is that the workers' compensation payments will not adequately compensate Francis.

Exclusive Remedy After talking to his family's lawyer, Francis learns the law generally prohibits lawsuits by employees *against employers* for work related injuries. As explained to Francis, this prohibition is because of the “exclusive remedy” provision in the state's workers' compensation law – Francis' recovery from Admiral is *restricted* to payment of workers' compensation benefits. The law does not allow Francis to sue his employer, Admiral.

Third Party Claim But Francis also learns that “exclusive remedy” does not forbid him from suing certain other “third parties” responsible for his injury. In particular, his lawyer suggests he sue the *manufacturer* of the belt buckle production machine, a company called Acme Tool and Die.

Shortly thereafter, Francis' lawyers file a lawsuit against Acme, alleging Acme is strictly liable as a product manufacturer due to an alleged defect in the machine that prevented the dies from closing. The suit demands damages not paid by workers' compensation, such as pain and suffering. Francis' suit against Acme is considered a “third party” claim.

Third Party Over After receiving the lawsuit filed by Francis, Acme's attorneys find that Francis was not adequately trained in the operation of Acme's machine and further that Admiral removed the guard on the machine. On this basis, Acme files a lawsuit against Admiral, alleging that Admiral was negligent in training Francis and in removing of the machine's guard and that Admiral's negligence caused, at least in part, Francis' injuries.

Put another way, Acme is alleging that Admiral *was negligent* and is thus demanding that *Admiral* pay some (if not all) of the damages Francis is demanding *from Acme*. The claim by Acme against Admiral is known as a third party “over” claim.¹ The reference to “over” conveys that Francis' claim for damages has *come full circle* – Francis first sued Acme who, in turn, sued Admiral, Francis' employer.

Employers' Liability Insurance Admiral's workers' compensation insurer is already paying the *statutory* workers' compensation benefits to Francis. But the standard April 1, 1992 edition National Council on Compensation Insurance (NCCI) Workers' Compensation policy includes *multiple* coverage parts. One very important part of the NCCI policy is Part Two - Employers' Liability Insurance. This part *expressly* provides coverage to Admiral for the damages being sought in the third party “over” claim brought by Acme:

The damages we will pay, where recovery is permitted by law, include damages:

1. For which you [Admiral] are liable to a third party [Acme] by reason of a claim or suit against you [Admiral] by that third party [Acme] to recover damages claimed against such third party [Francis' claim against Acme] as a result of bodily injury to your [Admiral's] employee [Francis]²

In short, to the extent that Admiral is found to be responsible *in tort*³ for damages to Acme because of Francis' work related injury, Admiral is covered by Employers' Liability Insurance, Part Two, of its workers' compensation policy.

Insurers' Respond Admiral's workers' compensation insurer, Rock Solid Assurance, reviews the Acme claim and readily agrees to defend Admiral in accordance with Part Two (Employers' Liability Insurance)

To learn more about how AmWINS can help your clients who may be impacted a third party action over claim, reach out to your AmWINS contact or send an email message to marketing@amwins.com.

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of the policy. This comes as a relief to Admiral, who also reported the Acme claim to its Commercial General Liability Insurer, Durable Indemnity. Durable denied coverage entirely, including any obligation to provide defense to Admiral for the negligence allegations listed in the Acme complaint, citing the CGL policy’s Employer’s Liability exclusion.

Exclusive Remedy Extended As a national insurer, Rock Solid is quite familiar with third party over claims similar to the claim filed against Admiral by Acme. The strategy adopted by Rock Solid is simple – they move to have the complaint dismissed. Their motion to the court is concise – the workers’ compensation statute grants *immunity* to employers for damages claimed *in tort* by its employees – regardless of the ultimate source of the claim. Put another way, the statute prohibits not only Francis from suing for negligence, but prohibits *tort claims* against Admiral by any other party seeking to recover damages owed to Admiral’s employees. The court rapidly grants Rock Solid’s motion and dismisses Acme’s complaint, finding that Acme’s complaint against Admiral is impermissible as it violates the workers’ compensation statute.

Acme Appeals Acme’s attorneys are stunned by the motion judge’s ruling. Francis’s injuries are quite serious, including permanent and severe facial disfigurement. Further, Acme’s demand of contribution, properly filed with the New York courts, was supported by competent medical evidence showing Francis suffered a “grave injury.” Acme appeals the motion judge’s dismissal of its case, pointing out to the Appellate Division the *express exception* in New York’s workers’ compensation statute for “grave injury.” Stated differently, Acme is arguing that Rock Solid and the motion judge were *wrong about the law* – while exclusive remedy *normally* would apply in this situation, the statutory immunity granted to Admiral *does not* apply to third party over claims when the employee has sustained a “grave injury.”

Appellate Ruling A reversal of the trial courts motion quickly follows – the basis for the dismissal of Acme’s claim against Admiral was a misreading of the law. Acme’s *tort liability* claim against Admiral is reinstated because of the “grave injury” exception to statutory immunity. Part Two (Employers’ Liability Insurance) of Admirals policy requires Rock Solid to defend the reinstated tort claim against Admiral. If Admiral is found to have caused, even in part, Francis’ injury by its negligence, then Part Two (Employers’ Liability Insurance) will also require Rock Solid to pay Admiral’s share of the damages for Francis’s “grave injury.”

This example is an illustration of third party over claims in tort. See Part Two of Third Party Over Claims for a discussion on how liability policies may apply to third party over contractual indemnity claims.

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¹ Alternately known as “claim over” or “liability over”

² For the purposes of this illustration, the names of the parties have been inserted into the policy wording.

³ See definition of “insured contract”: “...Tort liability means liability that would be imposed by law in the absence of any contract or agreement.” ISO Commercial General Liability Coverage Form CG 00 01 12 07 © ISO Properties, Inc. 2006