

MASS TORT SUBROGATION

This article addresses subrogation of mass tort claims. To review, mass tort claims are often settled in large groups, yet still treated individually. In this way, mass torts are different from class actions where everyone receives the same settlement amount. Instead, different people will receive different settlements based on such factors as extent of injury, pre-existing risk factors, etc. Mass tort resolution of liens and subrogation claims have some individual and class elements when resolved in bulk, as discussed in this article.

First, unlike many single event personal injury cases, the vast majority (if not all) of the defendants in mass tort cases insist that you actively seek out and resolve known *and unknown* health insurance liens as a condition of settlement. Often with automobile crash cases, for instance, the tortfeasor (or more often, its carrier) will insist that you proactively resolve all disclosed and undisclosed public liens, such as worker's compensation, Medicare, and Medicaid as well as health insurance liens for which you or the tortfeasor/insurance carrier has been put on notice. However, they generally do not require you to seek out and open a claim with a health insurance carrier that has not come forward to assert a lien, even if you know the health insurer has paid related medical bills. Whether you, as the plaintiff's lawyer should do so or not, regardless, is beyond the scope of this article.

It seems likely that the mass tort defendants insist on proactively resolving known and unknown liens because such defendants must deal with hundreds, if not thousands, of related claims, and the risk of subsequent liability and problems is deemed unacceptable.

As mentioned, mass tort liens are often resolved in bulk. A company that specializes in processing and resolving mass tort and class action settlements, such as Garretson Resolution Group or Providio, is generally hired to negotiate these liens in bulk. You, as the plaintiffs' lawyer, may hire such a company for your own group of cases, or you may join with other law firms so many law firms' cases may be jointly negotiated. In fact, the Defendant will sometimes insist that the same company be used by all Plaintiffs, especially for mass torts with few plaintiffs' law firms involved.

In these instances, the company will negotiate a resolution that has individual and "class" elements. Each claimant will have a different, individual lien amount, but every claimant would receive the same "class wide" discount based on each lien and the amount of the settlement. The claimants enjoy the benefit of negotiating as a group which greatly increases their bargaining power compared to negotiating alone. For instance, the company may negotiate a resolution where the health insurer receives the lesser of twenty percent of the gross settlement or twenty percent of the final lien. As with individual cases, the "final lien" is the list of paid bills that the parties agree are actually related to the injury. In large mass torts, this determination can of course be a time consuming process. Many negotiated settlements will include a process to resolve disputes over whether items are related, including referral of such disputes to a special master.

In turn, it is up to each respective insurer whether they wish to participate in any such resolution. Based on this author's past practice, it seems that public insurers generally agree to do so and private insurers are less likely. Generally, as you may expect, private health insurance companies'

willingness to participate is often a product of how strong the law is to support enforcement of their claimed lien rights. For instance, fully self-insured health plans are less likely to participate because ERISA pre-emption prohibits state law limiting their lien rights. On the other end of the spectrum, health insurance plans that are not fully self-insured and do business in states with plaintiff-friendly statutory limitations on lien rights are more likely to participate. However, this is not a hard and fast rule and fully self-insured health plans, for instance, may choose to participate. The insurance companies that choose to participate will enjoy the benefit of a definite recovery on a large number of cases and reduced processing costs in resolving the claims.

Generally, the company hired to negotiate these liens is paid a flat fee per case. Interestingly, it is not just the plaintiff that always pays this fee. For instance, the insurer (or a company that is representing multiple insurers, like Rawlings, for instance) may agree to pay part of the flat rate fee due to the benefit of the global lien resolution process. This flat fee is generally lower for private insurers than public health insurance due to the increased time and difficulty in processing public liens. The company will also often earn other fees related to the settlement. For instance, the company may be paid a small flat fee per case to confirm or deny Medicare or Medicaid enrollment for each case. Also, the company might also be hired to process a settlement where the company is hired to allocate a bulk settlement to each claimant based on certain objective criteria.

If one or more of your mass tort claimants are not part of a bulk lien resolution, then the process is not that different from an individual case. You will need to contact the health insurer (if you have not already been put on notice), agree on a list of claims that are actually related to the injury, and negotiate a resolution. You may choose to do this on your own or hire a company to do so. Often times, the same company hired to perform the bulk lien resolution process will offer to resolve such individual liens on a flat rate basis, though the per case fee is generally higher.

As a final note, this author would recommend against opening liens before settlement for three reasons. One, many cases will be screened and will be dismissed for not meeting criteria, or otherwise. Two, mass tort cases can last many years and lienholders may perpetually ask for updates. And, three, you do not want to risk interfering with a claim that may be eligible for a negotiated group settlement, as discussed in this article.