



5 Tips for Drafting Effective Settlement Agreement Lien Resolution Provisions

Mass tort Master Settlement Agreements (“MSA”) invariably include provisions that assign responsibilities –and potential liabilities—related to the identification, resolution, and payment of medical liens. Coming to an agreement on the scope and extent of lien provisions can be a challenge for parties during settlement negotiations. And too often, unfortunately, the spirit of the agreement in such hard-struck bargains is lost when poorly crafted settlement agreement provisions result in significant delays and problems down the road.

Consider this example: parties agree to a settlement, and the agreement requires that liens be “released” as a condition precedent to disbursing the settlement funds; however, lien payments to secure releases are made from those very settlement funds that cannot be released for payments until the liens are released—a conundrum! Provisions like this result in major delays—often adding months and sometimes years to the time required to disburse all funds.

Avoiding traps-for-the-unwary when drafting settlement agreement lien provisions requires a balancing act—to be as precise as possible on issues—except for the issues where built-in flexibility is preferred.

The following five tips help find that balance and prevent issues that result in long delays and angry clients:

1. **Be specific on requirements for particular lien types**
Avoid language that requires the resolution of “any and all liens”. Instead, specify the type of liens that require attention. For example, if Medicare liens are to be resolved, clearly state if only Medicare Parts A/B are included, or if Medicare Parts C/D are also included, and the respective requirements for each type. If private healthcare liens are to be resolved, this should be explicitly stated in the agreement.
2. **Be specific on responsibilities**
Spell out which party—whether a party to the settlement or a third-party administrator—is responsible for performing which tasks relating to lien resolution, whether they be identification, disclosure/certification, production of documents and reports, approval steps, etc. These lien resolution terms should be explicitly addressed and agreed upon, either in the MSA itself or in an addendum. Clarity in these provisions is key to ensuring all parties are clear on expectations and which liens will be addressed.
3. **Specify procedures for lien identification**
When specifying the type of liens to be resolved, an MSA should clearly indicate liens for which affirmative resolution efforts are required by a lien resolution administrator and the process for disclosure which liens will be self-identified by the claimant. Generally, a lien resolution administrator will affirmatively identify Medicare Parts A/B and Medicaid for the claimant’s state of residence. For other lien types—private liens directly asserted by a lienholder or self-reported by a claimant,



for example—settling parties have a wide range of options regarding disclosure, certification, and documentation. By identifying these responsibilities in the MSA, the parties will have clearly defined expectations moving through the settlement.

4. Beware of payment procedure pitfalls

There are several things to consider when drafting lien payment provisions. First, do not include specific payment requirements, as these may not line up with the customary (and reliable) payment processes established by lienholders and the lien resolution administrator. Instead, use general provisions. For example, Medicare requires liens related to large mass tort settlements to be paid in batches on a periodic basis—not as individual liens are resolved. If a settlement agreement requires a lien to be paid at the time it is finalized—or before other funds are released—the conflict with Medicare requirements will create headaches and delays for all parties.

Second, if working with a lien resolution administrator, the settlement agreement should include provisions that allow for lien “holdbacks”. Lien resolution administrators are often able to obtain recovery caps from lienholders, meaning settlement amounts above those caps can be released while the lien is negotiated and resolved. MSA holdback provisions allow for the release of some funds to claimants before liens are resolved, while still satisfying the duty to resolve those liens.

Finally, ensure the MSA allows for funds to be available to pay lienholders. The settlement must be funded in order for lienholders to be paid. As noted in the introduction, including language that requires the release of liens prior to payment can cause major delays in the finalization of the settlement.

5. Avoid specific requirements for proof of satisfaction.

Lienholders with statutory recovery rights, i.e. government agencies, do not customarily provide releases in favor of all parties upon satisfaction of a lien. Accordingly, rather than requiring a formal release, the MSA should only require reasonable documentation evidencing satisfaction. Specific releases included in an MSA may not be industry standard, and the lienholder is under no obligation to provide the documentation specified in the MSA. For example, in a recent large global settlement, the defendant required a specific release from Medicare, and if this release was not provided, the defendant was allowed to terminate the entire agreement. CMS would not provide this type of release, as it was not part of its typical process. While the settlement ultimately moved forward, the defendant could have walked away based on this provision.



Additionally, if working with a lien resolution administrator, allow that entity to provide proof of satisfaction. This is quicker and easier than placing the burden of producing documentation on the lien holder

Properly handling lien resolution and payment provisions is an extremely important aspect of completing a Master Settlement Agreement. Without proper provisions, settlements can fall apart or face major delays. A lien resolution administrator can assist in ensuring these provisions are proper and effective.

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