Avoiding Common Pitfalls in Resolving Liens Asserted Against Personal Injury Cases

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Resolving medical liens is often the most complex aspect of successfully concluding a personal injury case. Properly asserting defenses to those liens can often result in doubling the client's net recovery. Therefore, it is imperative to have an organized approach to minimizing these liens. Following are some guidelines to assist you as the personal injury attorney in avoiding common mistakes and maximizing your client's net recovery.

1. *Evaluate the Lien at the Initial Screening of the Client*

There are a number of cases in which the sheer size of the lien virtually precludes a successful outcome. For example, if a client consults you about a case with a $50,000 policy limit in which MediCare has paid $250,000 in accident related treatment, there is little you can do for your client. Absent a waiver in that situation (which is far from guaranteed), the end result under the law would be for only MediCare and the attorney to be paid. While the inclination of most attorneys in that situation would be to split their fee with their client, it is not clear that such a solution is even legal under MediCare, which employs an actual common fund discount. Likewise, if your client has a self-funded ERISA plan lien waiving all defenses that far exceeds the policy limits, this gives the attorney an opportunity to approach the ERISA plan regarding negotiating a sliding scale or other arrangement before deciding to pursue the case.

2. *Get or Request All Relevant Lien Documents at the Initial Screening*

In your initial telephone conference with a potential client, inquire about the source of payment of all of the client's medical expenses. Have the client bring all relevant plan documents to your initial meeting. In an ERISA setting, when the plan is self-funded, this is usually the Summary Plan Description ("SPD"). If it is an insured ERISA policy, it is often called an Evidence of Coverage. In a non-ERISA plan, it will normally be the client's insurance policy. SPD's must be issued to all employees under ERISA. Frequently, the clients lose them or throw them away. But, it is a simple matter for the client/employee to request the relevant plan document from work through the HR department or the insurance clerk. You must obtain the complete relevant documents in order to assess the defenses your client may have. Under no circumstances should you evaluate a lien claim based upon the bare subrogation provision that the plan's collection agency has sent you, unless that provision demonstrates a complete defense, such as failure to waive the make whole doctrine.

3. *Set Forth the Lien Related Services which Are Covered in your Personal Injury Retainer*

Typically, most attorneys will attempt to resolve lien claims on behalf of their clients as part of resolving the personal injury case. It is recommended that the actual scope of the work that is covered be addressed to avoid any conflicts with the client. For instance, it is common to provide that there is no additional charge for negotiating liens but that a new retainer would be necessary if lien litigation is necessary. It may also be helpful to reserve the right to engage a lien consultant as a cost of the case, where necessary.

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4. *Avoid Ordering Medical Bills/Records in a MediCare Case until MediCare has been Billed by the Provider*

Because MediCare is a secondary payer system, MediCare is not supposed to pay any bills when a primary payer (such as tort insurance) can be expected to pay shortly. This is defined in the CFR's as within 120 days. Thus, MediCare should refuse to pay when the case has been settled quickly after the accident. More importantly, no provider is forced to take MediCare. Any provider can choose to bill your client instead, but they must wait for the resolution of the case to collect. This can cause catastrophic damage to your case when a hospital with a large bill decides to wait and be paid from the personal injury case. The reason is twofold. First, MediCare in California steeply discounts medical bills. It appears that MediCare's reimbursement rate averages about 20% of the total bill. Secondly, once MediCare is billed by the provider, no balance billing is allowed. Consequently, if you tip off a hospital with a large bill that there is an injury case in the works by immediately ordering bills and records, you invite the hospital to sit back and lien the case and attempt to recover 100% of its bill. Advise your client to copy you with all EOB's showing MediCare payments so that you can track the status. If you absolutely must have the hospital's medical records or bills before MediCare has been billed, have your client request them without raising the issue of the injury claim.

5. *Understand Which Liens Impose Personal Liability on the Attorney*

As a general rule, public benefit liens usually impose liability upon the attorney. Thus, with MediCare, Medi-Cal or CMS, the attorneys are normally the guarantors of the public lien. If the attorney creates a lien for his client's treatment or signs a lien, the attorney is typically liable. A sure way to invite unwanted attention from the State Bar is to create and sign a lien for your client's treatment and then not honor the lien. For these reasons, an attorney should never sign a lien that he may need to challenge.

In the private lien sector, health plan liens are not normally enforceable against the attorney under California law. See *Farmers v. Smith* (1999) 71 Cal.App.4th 660; *Farmers v. Zerin* (1997) 53 Cal.App.4th 445. Under ERISA, the Ninth Circuit has previously held that an attorney cannot be held liable for an ERISA lien that he did not agree to honor. See, *Hotel Employees & REIW Welfare Fund v. Gentner* (9th Cir. 1995) 50 F.3d 719, 723. The Sixth Circuit held in *Longaberger v. Kolt* (6th Cir. 2009) 586 F.3d 459 that an attorney could be liable for an ERISA lien based upon the imposition of a constructive trust pursuant to the Supreme Court decision in *Sereboff v. Mid Atlantic Services, Inc*. (2006) 126 S. Ct. 1869, 164 L. Ed.2d 612. This holding was followed by a federal district judge in Sacramento in *AC Houston v. Berg*. This case was recently argued in the Ninth Circuit by CAOC and reversed on December 29, 2010 in an unpublished decision.

6. *Liens on Wrongful Death Cases*

In a wrongful death case, do not automatically assert the decedent's medical bills as damages until you have a full understanding of the value of the case versus the relevant policy limits. Because California does not permit recovery of medical bills in death cases (absent a survivor's claim), you may be able to avoid liens for medical expenses when the claim is limited to wrongful death. *See e.g., Fitch v. Select Products* (2005) 36 Cal.4th 812 and MediCare Secondary Payer Manual §50.5.4.1.1.

7. *Hold Harmless Provisions in Releases*

Do not allow clients to sign unlimited hold harmless provisions related to liens in releases. Rather, exempt from such provisions any liens previously served upon releasees, their agents or attorneys, and not served upon you. Certain liens, such as hospital liens, do not provide for any notice to the injured party or his attorney. This practice

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prevents your client from unwittingly "buying" one of these undisclosed liens through the release.

8. Medical Care Recovery Act Claims

Do not agree to represent the U.S. in a Medical Care Recovery Act claim (USN, VA, Champus, etc.). The standard notice letter from the U.S. is highly misleading. Instead, acknowledge the U.S. has a claim and offer to address it at the conclusion of the case. This avoids the inherent conflict of interest and preserves the common fund doctrine and all equitable defenses on behalf of your client. See, "Handling Medical Care Recovery Act Claims for Reimbursement" by Donald M. DeCamara, *Trial Bar News*, Vol. 32, Issue 8, October 2009, at page 5 for further information re handling these claims.

9. Kaiser Arbitrations

Generally oppose Kaiser's attempts to submit reimbursement claims to binding arbitration. Arbitration greatly favors Kaiser because they will attempt to insist upon a neutral arbitrator from their approved list. There is a great deal of financial incentive for Kaiser arbitrators to remain in Kaiser's good graces. Fortunately, attempts to force Kaiser arbitration can normally be blocked. Kaiser's arbitration provision fails to comply with minimum requirements in ERISA cases. See 29 CFR 2560.503-1(c)(4). This is spelled out in Kaiser's enrollment form even though Kaiser's attorneys are generally not familiar with the provision. Secondly, Kaiser's standard enrollment form in non-ERISA cases was found to be unenforceable in *Burks v. Kaiser* (2008) 160 Cal.4th 1021. Always request the enrollment form from Kaiser to compare it to that in *Burks*. Finally, Kaiser appears to have a serious scanning or microfiche problem with their enrollment forms that has rendered many of them illegible. The Kaiser Arbitration Office will dismiss the Kaiser demands for arbitration on request if legible enrollment forms are not provided within 20 days.

10. *Ahlborn* Motions

Bring an *Ahlborn* (126 S. Ct. 1752) motion pursuant to Welfare & Institutions Code §14124.76 to reduce Medi-Cal's lien in an appropriate case. Medi-Cal has been stubbornly resistant to following the law in this regard. After a successful reduction from a court, attach that ruling to all future requests for *Ahlborn* reductions made to Medi-Cal. This greatly improves the chances of obtaining significant voluntary reductions from Medi-Cal.

11. Priority of Attorney's Fee Liens

Recognize when your attorney's lien has priority. Many statutory liens codify the common fund doctrine. For example, Medi-Cal provides for a 25% common fund and MediCare provides for an actual common fund reduction. While the hospital lien statutes at Civil Code §3045.1, *et seq*., do not incorporate common fund, they do limit the hospital lien to 50% of the client's gross recovery "after paying prior liens." The attorneys fee lien is just such a prior lien in the usual case when the attorney was retained before the hospital lien was served. See, *County of San Bernardino v. Calderon* (2007) 148 Cal.App.4th 1103. In a non-statutory lien, if the lien claimant is not a creditor and the lien provision does not expressly waive common fund, then the common fund reduction will apply. Also, in *Gilman v. Dalby* (2009) 176 Cal.App. 4th 606, the court held that an attorney's lien for fees and costs takes priority over a prior medical lien.

12. Hospital Liens

Hospital liens may not be asserted against UM or UIM recoveries. *Weston Reid LLC v. AIG* (2009) 174

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Cal.App.4th 940. Also bear in mind that hospital liens are not exclusive remedies so the hospital can enforce the lien against your third party action and then sue your client for any unpaid balance. See, *Mercy v. Farmers* (1997) 15 Cal.4th 213. Therefore, if you are allowing a hospital lien to be paid without challenge, you should attempt to get a full release or enter into a global reduced settlement with the hospital.

13. Make Whole Defense

Make whole is still a complete defense to a health plan subrogation or reimbursement claim under both state law and ERISA, **unless it is specifically waived** in the provision. Express waivers of the defense are enforceable. Bear in mind that several large health plans (*i.e.*, Health Net and PacifiCare) generally do not waive make whole in their subrogation provisions. Those same plans are heavily capitated and purport to assign the right to balance bill to their providers. Providers are not normally subject to the make whole defense because they are usually creditors. However, in the case of providers taking the right to balance bill by assignment from the health plan, providers subject themselves to all defenses that the insured has against the plan, including the make whole doctrine.

14. Evaluate all Contractual Lien Claims for Drafting Errors

Subrogation provisions are often an afterthought in the drafting of a plan document. Consequently, they are frequently subject to drafting errors. Common problems include failing to index or highlight the provision, mislabeling the provision or placing it in a part of the policy where no insured would think to look for it and failing to properly cross-reference the provision. In California policies, the reasonable expectations doctrine applies along with the "conspicuous, plain and clear" rule. Surprisingly, ERISA has very stringent drafting requirements, which are frequently disregarded. *See, e.g.*, 29 U.S.C. §1022, 29 CFR 2520.102-2 and 29 CFR 2520.102-3(l). Obviously, you must have the complete document in order to properly conduct this review. This may be called a SPD or Evidence of Coverage under ERISA or a Policy or Summary of Benefits in an insured plan not subject to ERISA.

15. Determine Which Law Applies

ERISA applies to all group benefits of private employment. Public entity and church plans are exempt from ERISA. See 29 U.S.C. §1003(b). There is an interplay between ERISA and state law that is sometimes confusing. A self-funded ERISA plan is subject only to the federal law of ERISA and not to state law. However, an insured ERISA plan is subject to both federal ERISA law and state insurance regulation by virtue of the ERISA preemption provisions that "saves" to the states the power to regulate insurance. Thus, as an example, an insured ERISA plan is subject to Civil Code §3040 while a self-funded plan is not. Many attorneys attempt to use FreeERISA.com to obtain the plan's Form 5500 information tax return. This is not a good source for the information because most self-funded plans purchase stop loss insurance so the 5500 for a self-funded plan will usually show that it is funded by both insurance and general assets of the plan sponsor. Under Ninth Circuit authority, purchasing stop-loss insurance does not convert a self-funded plan into an insured plan. The best source of the funding of the plan is in the SPD that must set it out as a matter of law. See, 29 CFR 2520.102-3.

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16. *County Medical Services (CMS) Lien N/A to Settlements*

CMS liens are applicable solely against judgments and not settlements based upon the language in Government Code §23004.1. Said liens can be expunged on a motion if necessary, but will normally be voluntarily withdrawn by CMS on proof of a settlement. Understand that CMS is still a creditor of your client (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105), but it rarely attempts to enforce those rights.

17. *Apply All Applicable Defenses*

Most subrogation/reimbursement claims are subject to multiple deficiencies that can be asserted as partial or complete defenses. At the conclusion of the case, the best avenue for obtaining waivers or large reductions of those claims is to set forth all available defenses in a detailed letter to the lien claimant. Learn to spot and employ these defenses by going to the lien seminars and staying abreast of developments in the area. When an attorney is not familiar with the relevant defenses, he should consult someone who can protect his client's interests. **TBN**