Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2011 Issue

Thomas C. Zaret

Professional pitfalls posed by statutory and contractual liens

Strategies to avoid lien and reimbursement issues between attorney and client – and the malpractice cases that can arise from them

Consumer attorneys in personal-injury matters frequently encounter lien and reimbursement issues that may present a quandary in terms of honoring the lien/reimbursement claim, especially when the client may dispute payment thereof. Because these issues pose professional liability risk to the lawyer, this article addresses some of the unique ethical issues and obligations involving liens/trusts and collateral sources.

Statutory liens

Statutory liens are financial obligations that arise by operation of the law.

Medi-Cal/Medicare

These are considered "super liens." The attorney must ascertain if Medi-Cal or Medicare has paid some of the medical expenses related to the personal-injury claim. Concerning Medi-Cal, the reimbursement right is contained in Welfare & Institutions Code sections 14124.71-14124.79. The attorney and insurance company are obligated to report to the Director of the California Department of Health Services the fact that a lawsuit has been filed within 30 days of said filing. (Welf. & Inst. Code, § 14124.73.) There is no Medi-Cal lien on wrongful-death recovery because a wrongful-death claim does not include compensation for the victim's medical expenses. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819.) A Medi-Cal lien should be resolved before a minor's compromise application and the court must be apprised of the same. Medi-Cal liens can typically be resolved within 30 to 60 days through the Department of Health Services.

Medicare does not have a provision similar to Medi-Cal requiring notification of a lawsuit. However, Medicare has a right of action to seek personal reimbursement from the attorney. (42 USC section 1395Y (b)(2)(B), *Zinman v. Shalala* (ND CA 1993) 835 F. Supp. 1163, 1166-1168.) Unfortunately, it can take a substantial amount of time to get a Medicare lien resolved (6 to 12 months.)

It is increasingly common for an insurer to include "Medicare" as a payee on the settlement check. While, the insurer will insist that this is done to protect it from claims for payment by Medicare, it also can dramatically increase the time it takes to negotiate the settlement check, which benefits the carrier economically.

What can the plaintiff's attorney do when the insurance carrier insists on putting Medicare's name on a settlement check? It is suggested that the attorney offer to sign and have his or her client sign a hold harmless agreement, holding the insurance carrier harmless from any claim by Medicare. If the carrier agrees to this, the plaintiff's attorney should retain an amount in the trust account sufficient to satisfy the lien. While Medicare will reduce its lien to cover its share of "procurement costs" (attorneys' fees and costs), it may be wise to retain the entire amount of the medical bills paid by Medicare. Once the lien is resolved, any funds remaining in the trust account can be disbursed to the client.

The risk to a lawyer in not properly handling these types of liens can be significant. Medicare is entitled to recover its entire lien, less procurement costs, even it that leaves the client with nothing. Medi-Cal, on the other hand, cannot recover more than the client recovers after attorneys' fees and costs are paid. (Welf. & Inst. Code, § 141124.78.)

Because clients with a significant Medicare lien and a difficult-liability case may face the prospect of recovering nothing by litigating the claim, educating them from the outset about how such a lien will have to be handled is critical. A lawyer who fails to explain what rights Medicare and Medi-Cal may have to the client's recovery, may be inviting legal action down the line.

At a minimum, the attorney-client relationship could be seriously damaged when the unsuspecting client learns that a substantial amount of the settlement to which she had agreed will not end up in her pocket, but will have to be paid to satisfy these types of liens.

An attorney can face disciplinary action for failure to honor Medi-Cal and Medicare liens. (*Matter of Riley* (Rev. Dept. 1994) 3 Cal. State Bar Ct.Rptr. 91, 110-112.) In *Matter of Riley*, the attorney failed to honor a Medi-Cal lien and was suspended from practice for a period of time.

Workers' Compensation liens

An attorney must give notice of filing a lawsuit against a third party to the employer which paid workers' compensation benefits "forthwith" via personal service or certified mail. (Lab. Code, § 3853.) Legal and ethical issues may arise when the attorney settles a third-party claim involving a workers' compensation lien as to whether the attorney can charge her fee on the total recovery or just on the recovery amount after payment of the workers' compensation lien. If a complaint-in-intervention or separate lawsuit has been filed by the employer, the attorney should only charge a fee on the amount recovered less payment to the workers' compensation carrier. If however, the workers' compensation carrier did not file suit, then the attorney may charge a fee on the whole recovery. (Lab. Code, §§ 3856, 3860, *Quinn v. State of California* (1975) 15 Cal.3d 162, 166-169.)

Hospital liens

Hospital liens are governed by Civil Code sections 3040 through 3045.4. For a hospital lien to be valid against the recovery in a personal-injury matter, the hospital must give proper written notice pursuant to Civil Code section 3045.3.

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The amount which the hospital may recover from the settlement is governed by Civil Code section 3040 and is limited to no more than one-half of the settlement. The lien must also be reduced to reflect for attorneys' fees and costs. However, it is important for both the attorney and the client to understand that, while the hospital cannot recover more than 50 percent of the settlement amount, that does *not* mean that the lien is fully satisfied by payment of that amount. The client remains liable for the balance, *unless* her attorney has negotiated that condition with the hospital.

Failure by the hospital to give proper notice pursuant to Civil Code section 3045.3, technically relieves the attorney of the obligation to pay the hospital's lien. However it is not good practice to avoid paying the hospital bill out of the settlement simply because the certified letter has not been sent. The patient typically signs an agreement to pay at the emergency room and will remain on the hook for repayment. The attorney should make every effort to resolve the lien as part of the settlement process. A client who thinks the entire case is resolved when he gets his portion of the settlement proceeds, will be unhappy to learn that he is the subject of a collection effort by the hospital after the fact. An unhappy client may be inclined to try to recover from the attorney, especially if there was never any discussion about the impact an existing lien might have on the amount payable to the client.

The issue of balance billing may arise when the client obtains emergency medical care, the health insurance carrier pays only a portion of the bill and the hospital or surgeon attempts to bill the patient for the balance. The hospital/surgeon may not balance bill beyond the agreed-upon contract rate with the health insurer. (*Parnell v. Adventist Health System/West* (2005) 35, Cal.4th 595.) Balance billing is not just prohibited where there is an established contract rate, but where the patient's health insurer did not have a contractual relationship with the emergency medical provider. (*Prospect Medical Group, Inc. v. Northridge Emergency Group* (2009) 45 Cal.4th 497.)

The attorney should keep the client apprised of all developments concerning liens, and the client's obligation to satisfy the lien. Rule of Professional Conduct 3-500 provides:

> A member shall keep a client reasonably informed about significant developments relating to the employment or representation....

Contractual liens

A contractual lien arises out of a contract between the client and/or attorney and a provider or insurance carrier.

Health care providers' liens

When an attorney signs a medical lien, the attorney is obligated to honor that lien or face legal action and/or discipline. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113-114.) It is important that the attorney carefully read all liens presented before signing same. What happens when a medical lien is signed by the client and not the attorney and the client instructs the attorney not to pay the lien? Under this situation, the attorney should encourage the client to resolve the lien; however, if the attorney has not signed the lien, the attorney should provide the funds to the client. But, the attorney should insist that the client sign a release indicating that he has instructed the attorney not to pay the medical provider and that the client remains legally obligated to pay the medical provider.

If an attorney and client both sign a medical lien and the client demands that the attorney not pay the medical provider from the recovery, the attorney must either resolve the lien with consent of the parties or file an interpleader action. (*In theMatter of Respondent P.* (1993) 2 Ca. State Bar Ct. Rptr, 622, 632.)

In situations where the client's medical pay carrier claims a reimbursement right, the attorney is not obligated to act as bill collector for the carrier on their reimbursement claim. (*Farmers Insurance Exchange v. Smith* (1999) 71 Cal.App.4th 660, 664.) However, the better practice is to attempt to resolve the matter on the client's behalf. The attorney should seek either a complete waiver under the "made whole" rule or request a one-third reduction for attorneys' fees under the common fund doctrine. The "made whole" rule applies to med pay reimbursement claims. (*Progressive West Ins. Co. v. Preciado* (2005) 135 Cal.App.4th 263.) Recently, certain carriers, including Geico and 21st Century, have been claiming that they are entitled to 100 percent med pay reimbursement and do not have to honor the "common fund" doctrine pursuant to *21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511. If this becomes an issue, send a letter with the following language and these carriers will honor a one-third reduction in the lien:

> You have refused to reduce 21st Century's med pay reimbursement claim by one-third under the 'common fund' rule, stating that *21st Century Ins. Co. v. Superior Court* held that the common fund rule no longer applies. This is clearly a bad faith tactic on your part.
>
> The *21st Century* case does not say what you claim and is not controlling in the situation we have here. In that case the Plaintiff tried to claim an offset of the total amount of the plaintiff's attorney's fees before reimbursing 21st Century under the common fund theory. The *21st Century* court stated that the common fund rule is the same as it always was, 'that 21st Century has properly discharged its obligation to pay its pro rata share of attorney fees...contributing $400 to Quintana's attorneys fees.' Hence, under the common fund theory, a med pay carrier still has to pay the percent that the plaintiff has paid for purposes of reimbursement.

(*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1297, 1284).

Health insurance liens

Health insurance obtained directly by plaintiff or her employer typically will contain a provision requiring reimbursement for sums paid to health care providers as a result of an accident. It is critical to obtain a copy of the health insurance contract to ascertain the reimbursement rights of the health insurance carrier. In cases where the plaintiff is not "made whole," a letter should be sent outlining that the client is not made whole after payment for medical expenses, lost wages, costs and attorneys fees. (*Sapiano v. Williamsburg Nat. Ins. Co.*

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(1994) 28 Cal.App.4th 533, *Barnes v. Independent Auto. Dealers of California* (9th Cir. 1995) 64 F.3d 1389.) Even in cases where the health insurance carrier has contracted around the "made whole" rule and "common fund" doctrine, where equity so dictates, counsel should still make a "made whole" and "common fund" argument.

Kaiser liens are typically "third-party" liens and therefore there is no right to uninsured or under-insured motorist recovery. Some health insurance carriers, for instance the Screen Actors Guild Health Plans, will demand the member and attorney sign a lien in order to continue paying the health care providers. In situations where this occurs, counsel should write the following language onto the lien:

> By signing this lien no rights are extended to the lienholder beyond those rights contained within the subject contract between the insurer and member.

Attorneys should confirm in writing with the client the health insurance lien obligations so the client is not surprised or disappointed once a settlement is consummated.

Conclusion

There is nothing worse than having a client come back to the attorney years after a case has resolved with "I didn't know about that lien" or "I didn't know it was my responsibility to pay that lien and I don't have the money now to resolve it." In order to avoid legal or ethical problems associated with liens, the plaintiff's attorney needs to educate the client from the outset of the case and must work diligently to "resolve the lien" before any settlement is concluded.

Thomas C. Zaret is a sole practitioner in Santa Monica. He has been practicing personal-injury litigation for over 27 years and has tried numerous personal-injury cases. He was recently profiled in the Los Angeles Daily Journal. *Thomas Zaret is AV rated and graduated from Michigan State University with a B.S. in Psychology in 1981, and received his J.D. from the University of San Francisco in 1984.*