

On Dealing with Lien Claimants

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You Need to Know How to Deal Appropriately with Lienholders

Sure as God made little green apples, if you are recovering money for your clients you will be faced with liens. So, in a way, needing to know about lien claimants is a good thing, because it means you are earning money for your clients.

Just the same, if you are not managing your dealings with lien claimants in an appropriate manner, you are at risk at a number of unpleasant, unhappy and potentially nasty consequences. Indeed, the potential problems range from personal liability for the funds that a lienholder is claiming all the way to State Bar disciplinary action.

It follows that knowing how to deal appropriately with lienholders is serious business.

Lien and Lienholder Basics

Lawyers frequently receive and hold funds that are subject to third party liens. A "lien" is simply a claim of a right to funds that might be received in the future. A "lienholder" is the holder of that lien right.

There are all different sorts of liens. Some are statutory by nature, such as the workers' compensation lien (Labor Code section 3856), the Medi-Cal lien (Welfare & Institutions Code sections 14124.72-14124.791), the county medical benefits lien (Government Code section 23004.1) or the hospital lien for emergency medical care or services (Civil Code sections 3045.1-3045.6).

Other liens are contractual, i.e., they arise out of some written contact between client and lienholder. These include attorney liens and medical care provider liens. In some cases, contractual liens may be "tri-partite," that is, the parties are the lienholder, the client and the attorney.

There are also equitable liens that come into being when a "court of equity decides that the equities require it." See, *Farmers Ins. Exch. v. Smith*, 71 Cal.App.4th 660, 83 Cal.Rptr.2d 911 (1999). However, since you will rarely see this type of lien in practice, we won't be discussing it beyond letting you know it exists.

Each different type of lien imposes a different obligation on the practitioner. For example, some statutory liens require the attorney to provide notice of settlement. Such is the case with Medi-Cal liens, where Welfare & Institutions Code section 14124.76 requires notice to the Director of Health Services before a judgment, award or settlement may be satisfied.

Indeed, the attorney's responsibility to the lienholder has often been characterized as a fiduciary duty. See, *Matter of Respondent P*, 2 Cal. State Bar Ct.Rptr. 622, 630 (Rev.Dept. 1993) (attorney had fiduciary duty to inform Director of Medi-Cal beneficiary's impending settlement).

Generally speaking, an attorney's knowing failure to honor a valid lien is cause for discipline. *Matter of Riley*, 3 Cal.State Bar Ct.Rptr. 91, 110-112 (Rev.Dept. 1994). Failure to promptly pay liens when funds were withheld from settlement for that purpose can likewise result in discipline. *Matter of Mapps*, 1 Cal. State Bar Ct.Rptr. 1, 6-7 (Rev.Dept. 1990).

So, recognizing and acting on liens is an important part of any practice.

Recognizing Liens

When taking a new case, it is fundamental that the attorney must identify any potential lien claimants and analyze the potential impact any lien claim might have upon recovery. Identifying potential liens requires interviewing the client to determine what if any benefits might have been paid by a lienholder and reviewing medical records.

The simplest liens to identify in a file are contractual liens, such as medical provider, hospital or attorney liens. These will generally appear in written form and should be kept in a separate folder with the client's file.

However, liens need not appear in your file to effectively attach to your client's funds. An attorney with a lien, for example, is considered "an equitable assignee of the judgment or settlement to the extent of fees and costs which are due . . . for services." *Levin v. Gulf Ins. Group*, 69 Cal.App.4th 1282, 1286, 82 Cal.Rptr.2d 228 (1999). Notice of the lien is not required for the lien right to be effective. See, *Cetenko v. United Calif. Bank*, 30 Cal.3d 528, 533, 179 Cal.Rptr. 902 (1982).

Medicare liens do not require notice and there is no statute of limitations. In fact, Medicare can come looking for recovery years after a matter has been resolved and, if the client has no money, is empowered to go directly after the attorney. So it is incumbent upon the attorney to determine if Medicare has paid any benefits that might give rise to a lien and act accordingly. See 42 U.S.C. sections 1395y(b)(1) & (2), 2651-2653.

Where Medi-Cal has paid benefits the attorney is obligated to inform the Director of Health Services within thirty days of filing a complaint and no settlement, judgment or award is effective without such notice. Welfare & Institutions Code sections 14124.73, 14124.76.

Crime victims assisted by the State Restitution Fund are subject to a state lien. Again, the attorney is obligated to notify the State within thirty days of filing. Government Code section 13966.01(e).

Any county provided hospital, medical or dental care gives rise to a county lien. There is no notice requirement on the part of the plaintiff's attorney. Government Code section 23004.1.

Workers' compensation benefits paid give rise to a lien right and the employer is entitled to notice of a third party lawsuit. Labor Code sections 3853, 3858, 3861.

Filing an action brought by or on behalf of a recipient of Children's Services Program benefits requires that the attorney give notice of that filing to the State Director of Health Services. Health & Safety Code section 123980.

HMOs and ERISA health plans can also have subrogation rights that create a lien interest in a case. The operative policy or plan documents will indicate what those rights are.

Negotiating with Lienholders

A. The Attorney Owes A Duty To The Lienholder

"(A)n attorney on notice of a third party's contractual right to funds received on behalf of his client disburses those funds at his own risk." Kaiser Found. Health Plan, Inc. v. Aguiluz, 47 Cal.App.4th 302, 304, 54 Cal.Rptr.2d 665 (1996).

Once an attorney receives notice of a lien, he or she is held to a fiduciary obligation with respect to the funds. Matter of Respondent P, 2 Cal.State Bar Ct.Rptr. 622, 632 (Rev.Dept. 1993).

Even so, an attorney receiving settlement proceeds or other funds is not generally obligated to satisfy non-lien client debts out of that money. Farmers Ins. Exch. v. Zerlin, 53 Cal.App.4th 445, 459, 61 Cal.Rptr.2d 707 (1997).

Since the attorney owes a dual duty to both lienholder and client, it is important to be proactive in negotiating with and transferring funds to lienholders.

B. Negotiable Liens

It is always best to negotiate with a lienholder prior to a case settling. You and your client have maximum leverage when payment is only a prospect and you can argue persuasively that a lienholder's flexibility will be key in getting everyone, including the lienholder, paid.

As a general rule, contractual liens provide the most flexibility in negotiation. Many offices routinely contact all medical care providers following a settlement asking for a reduction in the lien claims. Often, such reductions are granted as a matter of course.

Whether an attorney with a lien claim will be amenable to negotiating a lien is often a significant issue in resolving a case. The best practice when a prior attorney has handled a case is to inquire early on what the fee and cost expectation is should the matter settle. Sometimes there is bad blood between client and former attorney that further complicates the negotiation process. An agreement pre-settlement is the optimum course.

Workers' compensation liens are generally negotiable. Since an employer's own negligence can diminish their lien right, it is always worth looking for some employer negligence when working up a case, just so long as it does not overwhelm the negligence of the third-party tortfeasor. The comp carrier lien is net of an "equitable share" of the employee's attorney fee liability, effectively a "common fund" doctrine where the client receives a benefit for having created the fund that the lienholder can draw from. This is a complex area that requires some research and reflection. See, Labor Code section 3856, 3860.

Medi-Cal affords the State a first lien against a damage recovery, less 25% to defray attorney fees, up to one half the settlement proceeds. Welfare & Institutions Code sections 14124.72-14124.791. Medicare liens can generally also be reduced through negotiation to account for litigation costs and for the plaintiff's inability to recoup for all losses. See, Cockerham v. Garvin, 768 F.2d 784, 787 (6th Cir. 1985).

HMOs and ERISA plans will generally consider reducing their lien claims under certain circumstances. A new statute, Civil Code section 3040, provides some leverage for plaintiff's counsel in this regard.

If your client is facing special circumstances that mean paying a lien will create undue hardship, this will often affect the flexibility of the lienholder when negotiating a reduction.

C. Non-Negotiable Liens

Where a county has the right of subrogation for the reasonable value of any hospital, medical or dental care furnished to an injured person, the court is not empowered to reduce the lien amount. *City & County of San Francisco v. Sweet*, 12 Cal.4th 105, 116-117, 48 Cal.Rptr.2d 42 (1995); Government Code section 23004.1. The county may compromise, settle or waive all or part of its lien claim either for the convenience of the county or if collection would result in undue hardship. However, many county governments are rigid in this regard.

Children's Services Program liens likewise cannot be reduced by the court. See, *Tapia v. Pohlmann*, 68 Cal.App.4th 1126, 1130-1134, 81 Cal.Rptr.2d 1.

Even so, if your client is facing a special hardship, this may be grounds for the county or State to consider reducing or waiving the lien. The argument is worth making.

Conclusion

Pay attention to liens from the beginning of your case. Notify government agencies where required and consider the impact of lien claims in your overall assessment of the matter. Lien claims may dramatically limit your client's ultimate recovery prospects, something that both attorney and client need to examine when deciding whether or not to go forward.

Resources

The following are excellent sources of practical information for issues concerning liens and lienholders:

Flahavan, et al., *California Practice Guide — Personal Injury* (2000 The Rutter Group) Chapter 1; Summer, *New Ways to Cut Health Insurer Liens* CAOC Forum (Mar. 2001) at 26. Vapnek, et al., *California Practice Guide — Professional Responsibility* (2000 The Rutter Group) Chapter 9; Weil, *California Practice Guide — Civil Procedure Before Trial* (2001 The Rutter Group) Chapter 1.

Bill Daniels regularly publishes a variety of articles and videos to keep you abreast of legal developments and case law that affect our society.

[Balance Billing After Olszewski](#). The law surrounding balance-billing law is rapidly evolving. [Getting Ahead Of The Procrastination Curve](#), Might as well face it, you're addicted to late.

These previous and other articles/videos can be found in the Learning Center section of www.BillDanielsLaw.com

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