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Lien times

Evaluate healthcare liens at a case's beginning, when you have the most leverage


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By Miles B. Cooper

The lawyer made notes during the client call. "Your health insurance was through your union? The good news is I'm guessing they covered everything. The bad news is they have a right to reimbursement – known as a lien – and their rights are governed under federal law. The biggest challenge in your case is likely to be dealing with your union trust fund lien."

Why do we care so much

Liens are contractual or statutory rights for those who provide payments or services, primarily healthcare related, to our clients. In other words, that health insurance contract your client never read entitles the health insurance company to get reimbursed for payments it made when a third party – the defendant – is responsible for the harm.

We care because liens can take a big bite out of the client's recovery. We care because ignoring liens can expose our client to a later recovery action or a coverage denial down the road. We care because we as lawyers can sometimes be personally on the hook if we fail to address liens. Our discussion here focuses on health care plans, including statutory MediCare and MediCal recoveries, and does not go into workers compensation liens. A whole different animal there.

Analyzing a case at its beginning includes evaluating the liens so one can assess the most likely outcome at the case's end for the client. Evaluating liens includes knowing roughly how much each lien will be, what type of liens they are, and broadly speaking, what negotiating leverage we have with each lien. Why do this at the beginning? Because we have more leverage at the beginning than the end. Telling the "I'm not reducing a cent" lien holder that you won't pursue the case is much easier than working a case for years only to have all the client's money siphoned off to a lien with bulletproof full-recovery rights.

Take a contract out on them

To understand the enemy and our approach, we must classify them. First, our majority: standard health-insurance liens. These are not to be confused with the boogeymen liens, self-funded ERISA plans. How can one tell the difference? Obtain the summary plan description. This is something a client can easily do by requesting it from the employer. It will say "This is a self-funded ERISA plan," in the first couple pages if it is, and that's a time to pay close attention.

Standard plans are subject to state law, and thus the Common Fund doctrine. This doctrine dictates that, at a minimum, the lien must be reduced by the lawyer's fee percentage and pro rata share in case costs. Fortunately, these comprise the majority of liens. This type of lienholder also cannot take more than 1/3 of the total recovery. In cases where we decide to waive our attorneys' fees, we consider communicating this as some health plans will also waive their liens when lawyers do this.

Unfortunately, that ghoul known as self-funded ERISA looms out there in some cases, usually with larger employers and unions. Governed under federal law, these plans typically attempt to contract around all known lien-reduction tools. Their weakness lies in technical violations. These violations are so nuanced that there are specialized lawyers whose sole practice focuses on ERISA lien reduction.

We've found the best approach is to know up front whether it is ERISA-governed and attempt up-front negotiation, particularly if the lien eclipses available recovery. While some self-funded ERISA lien holders will say they don't negotiate, they sometimes back down when one plays chicken with the statute of limitations. The downside? This prolongs the case significantly. Sometimes, however, this is the way.

Many long-term disability insurance policies are also governed under ERISA, and the same negotiating tactics apply. Know the lien type, know the lien amount, and attempt early resolution.

Still as a statute

Statutory liens for services provided by the government include MediCare and MediCal, government hospitals, and fire department services. MediCare and MediCal are straightforward. Know that if we fail to notify them of a claim, we'll personally be on the hook. We use the joyous CMS portal, upload materials, and seek reductions. If the injuries are large and the defendant's payment low, one can seek a reduction using what amounts to the Made Whole doctrine, under *Arkansas Dep't. of Health & Human Servs.*, 547 U.S. 268 (2006), also known as an *Ahlborn* reduction.

The Made Whole doctrine in essence says our client's case was worth $5 million, she received only $500,000, or 10% of the case's value, and the lien should be reduced similarly. The *Ahlborn* process takes time, takes specific steps, and it totally worth it to maximize a client's net result.

Outro

Back to our lawyer. No surprise, the union lien was a self-funded ERISA lien, and the case's most complicated moving piece. Early identification allowed for very frank conversations with the client and the plan's adjuster, ultimately leading to a just outcome.

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