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Counsel May Be Unclear on Rights Of Lienholders Against Third Parties

By Michael M. Pollak

In a bodily injury case, attorneys and health care providers often file liens. When the case settles or a judgment is paid, the defendant's insurer can be confronted with conflicting demands: The lienholder insists that its name be put on the check, but the plaintiff's attorney refuses to agree. All involved parties — lienholders, insurers and counsel — frequently are uncertain of the rights of lienholders against third parties.

■ **Attorney liens.** In a contingent-fee case, when a plaintiff fires his or her attorney and hires a second attorney, if the first attorney has a valid lien and gives notice to the defendant's insurer, then the discharged attorney's lien is enforceable against the defendant and the defendant's insurer.

The insurer must include the name of the discharged attorney on the settlement or judgment check or else face liability to the discharged attorney for intentional interference with prospective economic advantage. *Levin v. Gulf Ins. Group*, 69 Cal.App.4th 1282 (1999); *Siciliano v. Fireman's Fund Ins. Co.*, 62 Cal.App.3d 745 (1976). The discharged attorney is an equitable assignee of the judgment or settlement. *Levin*; *Siciliano*.

In this respect, attorneys receive special treatment that is not given to others who provided services to the injured plaintiff, such as an auto-repair facility or a doctor. The medical lienholders' rights derive from statute, but no statute authorizes attorney liens against a third-party defendant or the defendant's insurer.

Not all discharged attorneys have a lien right enforceable against someone other than the attorney's client. *Levin* and *Siciliano* involved situations where the discharged attorney gave notice to the defendant's insurer. It is doubtful that a discharged attorney's lien rights will extend to a situation where the discharged attorney does not give notice of the lien to the defendant or the defendant's attorney or insurer.

Other limitations on the rights of a discharged attorney exist. If the discharged attorney had no written fee agreement, then the attorney has no right to claim a lien. *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond*, 36 Cal.App.4th 1011

(1995). An attorney who withdraws from a contingency-fee case because of a belief that the case is not worth pursuing forfeits any lien rights against a recovery that the plaintiff obtains. *Hensel v. Cohen*, 155 Cal.App.3d 563 (1984). And if the attorney-fee agreement is with the second attorney, then the first attorney has no right to fees unless the client approves the association and the split of fees. *Chambers v. Kay*, 29 Cal.4th 142 (2002).

■ **Medical-facility liens.** Civil Code Section 3045.1 governs medical liens. The statute provides any medical facility licensed in California with a lien for expenses for medical or other services to any person injured by reason of any wrongful act other than that covered by workers' compensation. The statute applies to private and public facilities. Section 3045.1 does not apply to individual physicians.

The Section 3045.1 lien applies whether or not the patient signed an agreement authorizing a lien. In this way, a private hospital has an "automatic lien" between itself and the patient. However, the lien is not automatic against anyone else. The lien is enforceable against an insurer only if the hospital gives written notice to the defendant or the defendant's insurer. Civil Code Sections 3045.1, 3045.3, and 3045.4. The lien does not take effect until the hospital gives written notice to those subject to it. *Mercy Hosp. & Med. Center v. Farmers Ins. Group*, 15 Cal.4th 213 (1997). Thus, if a defendant, the defendant's attorney and the defendant's insurer all were not aware of a lien under Section 3045.1, then it is not enforceable against them.

A health maintenance organization, health care plan or medical provider may enter into an agreement with a member or patient to receive a lien against any subsequent judgment or settlement obtained from a third-party tortfeasor or his or her insurer. Such an agreement ordinarily is enforceable against the member or patient. *Samura v. Kaiser Found. Health Plan Inc.*, 17 Cal.App.4th 1284 (1993). However, there is no statute authorizing an HMO, health care plan or medical provider to enforce a lien against a third-party's insurer. Apparently, no published opinion on that subject exists in California. If attorney liens are enforceable against third parties without any statute authorizing this, then why are doctors' liens not treated the same way?

■ **County liens.** A county furnishing medical care also has a lien right against the tortfeasor and the tortfeasor's insurer. Government Code Section 23004.1. The

county's lien rights are stronger than those of a private hospital because a county's lien applies against the tortfeasor's insurer even if the county fails to notify it. Section 23004.1(b). Also, it applies as a first lien against the judgment. Section 23004.1(b). The county is subrogated to the injured party's rights against the tortfeasor. Thus, it is important for counsel and insurers, on issuing a check, to determine if a county treated the plaintiff.

■ **Medi-Cal liens.** If Medi-Cal paid the plaintiff's expenses, then the state director of health services (the administrator of the Medi-Cal program) has a statutory lien on any judgment against, or settlement with, the insured defendant. Welfare & Institutions Code Section 14124.74(a). The statute does not require that the tortfeasor's insurer be given notice of the lien. *Bustamonte v. Flores*, 2003 DJDAR 5765 (Cal. App. 2nd Dist. May 30, 2003), held that a Medi-Cal lien did not attach to the proceeds of a wrongful-death judgment. The court noted that the plaintiff did not recover damages for the decedent's medical expenses.

■ **Medicare liens.** The Medicare Secondary Payer program largely governs Medicare's recovery rights. 42 U.S.C. Section 1395y(b). Medicare is secondarily liable where a tortfeasor's insurance covers accident-related expenses. *Zinman v. Shalala*, 67 F3d 841 (9th Cir. 1995). Thus, when Medicare pays medical expenses, it must be reimbursed if payment is received from a liability insurer. 42 U.S.C. Section 1395y(b)(2)(B)(i). Where Medicare pays for treatment, it has a lien against the tortfeasor and his or her insurer. 42 U.S.C. Section 1395y(b)(2)(B). The Department of Health and Human Services has a direct right of recovery against the tortfeasor (*Zinman*) and against the tortfeasor's insurer (42 C.F.R. Section 411.24(f)(1)). There is no requirement of notice to the insurer.

Are these liens enforceable in an uninsured-motorist claim? There is no California case on this issue. Government Code Section 23004.1(a) gives counties rights only "under circumstances creating a tort liability upon some third person." This suggests that county liens do not attach to uninsured-motorist claims. However, the language in the statutes authorizing liens for private hospitals, Medi-Cal and Medicare is broad enough that they may apply to uninsured-motorist claims.

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