

Lien Law: Recognizing and Management in the Personal Injury Case

I. INTRODUCTION

At first blush, a personal injury plaintiff's procurement of proceeds either through settlement or adjudication may seem to indicate a final resolution of his claim. However, a closer analysis of personal injury settlements and judgments reveals that a plaintiff's proceeds may be subject to a variety of liens and, as such, will not signal a true conclusion of a claim until all such liens are extinguished. Thus, in order to effectuate a complete resolution of a claim, counsel to both parties in a personal injury action must take care to identify any liens which may encumber a judgment or settlement and address them accordingly. Because personal injury liens may be held by both federal and state government agencies as well as private entities that provide medical care and benefits, attorneys must familiarize themselves with the rules governing each type of lien in order to effectively manage the personal injury litigation process.

II. MEDICARE LIEN ("SUPER LIEN")

Whenever Medicare pays a personal injury claimant's medical expenses for which it is only secondarily liable, it is entitled to recoup these payments from any and all parties who bear primary responsibility for the payment of such medical expenses.¹ Put another way, Medicare's payment of medical services often gives rise to a lien over any settlements or judgments subsequently obtained by the claimant in a personal injury action. Often referred to as a "super lien," Medicare's lien over personal injury settlement and judgment proceeds gets its teeth from the secondary payer provisions of the Social Security Act and takes precedent over all other liens or interests which may exist.² Under these secondary payer provisions, the federal government is subrogated to any right a Medicare recipient has for payment of certain medical expenses under worker's compensation law,

¹ Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(2) (2000).

² Timothy V. Hoffman and George L. Acosta, Beware of the "Super Lien": Medicare Payments Effect on Personal Injury Cases, 81 Ill. B.J. 81, 81-83 (1993) (citing 42 U.S.C. § 1395y(b) (1992)).

an automobile or liability insurance policy or plan (including a self-insured plan), no fault insurance, or an employer group health plan.³ In addition to its subrogation rights, Medicare may also bring a *direct* recovery action against any party who is primarily responsible for medical benefits received by the Medicare recipient or against any party who has received payment for such medical items or services from the financially responsible party.⁴

Federal regulations govern the process by which Medicare can recover its payment of medical benefits from the primary obligators (i.e., the issuers of worker's compensation plans, automobile or liability insurance, no fault insurance, or employer group health plans) of such benefits. These regulations deem settlement or judgment amounts received by a personal injury claimant "third party payments" from "third party payers."⁵ A third party payer is required to notify Medicare as soon as it learns that Medicare has paid for medical benefits for which the third party payer is legally obligated to pay. Upon receipt of any third party payments, the personal injury claimant must reimburse Medicare within sixty (60) days.⁶ If the personal injury claimant fails to do so within the requisite period, Medicare may then seek reimbursement from the third party payer even though such party has already made payments to the personal injury claimant.⁷ This particular provision is applicable even when the third party payer has no knowledge of Medicare's payment of claimant's medical benefits so long as it "is, or should be, aware that Medicare has made a conditional primary payment."⁸ In addition, if any entity designated a primary payer by the secondary payer provisions fails to satisfy Medicare's lien, the Social Security Act provides a private

³ 42 U.S.C. § 1395y(b)(2)(B)(iii)

⁴ 42 C.F.R. 411.24(e) (2007)

⁵ *Id.* § 411.21. "Successfully Discharging Medical Liens in Personal Injury Cases" (citing 42 C.F.R. 411.21)

⁶ *Id.* § 411.24(h)

⁷ Hoffman, *Beware*, *supra*, at 83 (citing 42 C.F.R. § 411.24(i)).

⁸ 42 C.F.R. § 411.24(i)(2)

cause of action against the primary payer which allows for damage awards double the amount of paid Medicare benefits.⁹

II. MEDICAID LIENS

As with Medicare, Medicaid is in a secondary payer position with respect to any third party who is legally obligated to pay for a Medicaid beneficiary's health services.¹⁰ Thus, when Medicaid pays an injured plaintiff's health care costs, it is statutorily entitled to recoup these payments from any proceeds the plaintiff subsequently obtains from the third party whose conduct necessitated medical care in the first place. Because Medicaid is a joint federal and state program, the process by which Medicaid can enforce a lien on third party payments varies by state.¹¹ In Georgia, O.C.G.A. § 49-4-149 confers upon the government the right to recover payments advanced by Medicaid and establishes the proper procedures for making these collections.¹² In addition to specifying when and how the Department of Community Health may perfect and enforce a Medicaid lien, this Code section limits the amount it may recover to the cost of the medical assistance provided to the Medicaid recipient.¹³ Furthermore, unlike Medicare's lien on third party payments, a Medicaid lien does not affect the priority of any attorney's lien.¹⁴

To ensure that Medicaid in fact serves as a payer of last resort as intended by federal law, states are required to "take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the [s]tate [Medicaid] plan."¹⁵ During this process,

⁹ 42 U.S.C. § 1395(y)(b)(2)(B)(ii)

¹⁰ U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, Third Party Liability Overview, <http://www.cms.hhs.gov/ThirdPartyLiability> (last modified Dec. 14, 2005).

¹¹ Erik V. Larson and Diana L. Panian, Successfully Discharging Medical Liens in Personal Injury Cases, 32 Cumb. L. Rev. 349, 355-56 (2001).

¹² O.C.G.A. § 49-4-149 (2007)

¹³ Id. §49-4-149(c), (d)

¹⁴ Id. § 49-4-149(b)

¹⁵ U.S. Department of Health and Human Services, supra note 10.

Medicaid recipients are expected to assist the state Medicaid agency (in Georgia, the Department of Community Health) by furnishing any information necessary to identify and pursue any potentially liable third party payers.¹⁶ The Medicaid recipient, his or her legal representative, or any person representing or acting as agent for the Medicaid recipient, is also responsible for making sure that the Department of Community Health fully recovers the cost of medical assistance Medicaid provided the recipient from any third party payers.¹⁷

III. MEDICAL PROVIDER LIENS

In addition to Medicare and Medicaid liens, institutions that have provided medical services to an injured patient may also have a lien on the patient's personal injury claims.¹⁸ However, O.C.G.A. § 44-14-470 grants these providers a lien only "upon...causes of action accruing to the person to whom the care was furnished...on account of injuries giving rise to the causes of action and which necessitated the hospital..."¹⁹ In other words, a medical provider may only assert a lien against parties liable in damages to the patient for the patient's injuries and not against the patient himself. Furthermore, the statute does not afford medical providers an independent right of action to determine liability for injuries sustained by a patient.²⁰

To enforce its statutorily authorized lien, a medical provider must comply with certain notice and time requirements enumerated in the Code. Specifically, the law in Georgia requires the medical provider to file the lien with the appropriate court as well provide written notice to the patient and, "to the best of [its] knowledge," any parties the patient alleges caused the injuries requiring medical

¹⁶ Larson, Successfully, supra at 355; O.C.G.A. § 49-4-149

¹⁷ William H. Overman, et al. "Expert Counsel and the Settlement Planning Process," Everything You Never Wanted to Know About Medicare/Medicaid (2003)

¹⁸ O.C.G.A. § 44-14-470 (2007).

¹⁹ *Id.*

²⁰ O.C.G.A. § 44-14-476

attention.²¹ Noncompliance with these requirements will generally result in invalidation of the medical provider's lien.²²

IV. WORKERS' COMPENSATION LIENS

Georgia Workers' Compensation law affords an employer and its insurer a subrogation lien on any recoveries an injured worker procures from a third party tortfeasor. This lien, codified at O.C.G.A. §34-9-11.1 (2007), enables an employer to recover the amount of disability benefits, death benefits, and medical expenses it has paid on behalf of an injured worker.²³ In addition to creating a lien on any third party payments to an injured employee, this Code section also subrogates an employer to any cause of action the injured employee has against a third party for the injuries incurred. More specifically, if an employee fails to institute his cause of action within the requisite time period, the employer, by operation of law, obtains the right to initiate such a cause of action either in its own name or in the employee's name.²⁴ Workers' compensation liens are also subject to the "complete compensation" rule, and as such, will not arise until the injured employee has been completely and fully compensated for all economic and noneconomic losses incurred as a result of the injury.²⁵

V. THIRD PARTY HEALTH INSURER LIENS

In Georgia, the "complete compensation" rule limits a health insurer's ability to recoup medical benefits it has paid on behalf of an injured plaintiff. The "complete compensation" rule had its inception in Duncan v. Integon Gen. Ins. Corp.²⁶, a Georgia Supreme Court case from 1997. Duncan involved a health insurance carrier who sought to recoup its payment of medical benefits on

²¹ O.C.G.A. § 44-14-471(a) (2007)

²² Id. 44-14-471(b)

²³ O.C.G.A. § 34-9-11.1(b) (2007)

²⁴ Id. § 34-9-11.1(c)

²⁵ Id. § 34-9-11.1(b)

²⁶ 267 Ga. 646, 482 S.E.2d 325 (1997).

behalf of an injured claimant from the settlement proceeds the claimant subsequently obtained from the third party tortfeasor's insurance company.²⁷ However, because the injured claimant's medical bills exceeded the amount she was able to recover from the third party tortfeasor, the Duncan court had to address who had priority to the third party payments: the injured claimant or the health insurer who contracted to assume the risk of payment of medical benefits. In answering this question, the court established the "complete compensation" rule, which essentially states that an injured claimant should be fully compensated for his injuries before a health insurer may assert a lien interest on the compensatory funds the claimant obtains in a personal injury proceeding against the tortfeasor who caused such injuries. However, because the court declined to decide the legal effect of an insurance policy provision expressly negating the complete compensation rule, the Duncan decision left several loose ends.²⁸ The Georgia General Assembly subsequently tied these loose ends with its enactment of O.C.G.A. § 33-24-56.1.²⁹ This Code section definitely establishes what the Duncan decision laid a foundation for: a rule denying a "benefit provider" a right of reimbursement when the injured plaintiff has not been completely compensated for all losses incurred as a result of the injury. In other words, an injured plaintiff's insurance provider may only attach a lien to the plaintiff's recovery proceeds when the amount recovered exceeds the sum of all the losses he incurred from the injury.³⁰ In addition to limiting the circumstances under which a health insurer may have a right of reimbursement, O.C.G.A. § 33-24-56.1 expressly denies the insurer any subrogation rights to an injured party's potential claims.³¹ It also prohibits the third party

²⁷ Id.

²⁸ C. Frederick Overby, et al., Trial Practice and Procedure, 49 Mercer L. Rev. 313, 316 (discussing Duncan, 267 Ga. 646).

²⁹ Overby, Trial, supra at 317

³⁰ O.C.G.A. § 33-24-56.1 (2007)

³¹ Id. § 33-24-56.1(e)

tortfeasor from including the health insurer as a co-payee on a settlement or judgment check or from attempting to reduce its own liability by offsetting any reimbursement claims.³²

Although O.C.G.A. § 33-24.56.1 seemingly established a bright line rule regarding a health insurer's ability to recoup its medical benefits payments, this rule becomes somewhat muddled when the health insurance policy is tied up in an ERISA plan. Because ERISA is a federal law, it preempts any inconsistent state laws "insofar as they relate to any employee benefit plan."³³ However, ERISA saves from preemption state laws regulating insurance.³⁴ Thus, even though the Supreme Court has ruled that an ERISA benefit plan can initiate a reimbursement action against an injured party who has recovered in tort for his injuries, state laws may still limit an insurer's right of reimbursement under ERISA.³⁵ Therefore, whether the "complete compensation" rule is operative in a reimbursement claim brought under ERISA hinges on whether the ERISA plan is self-funded or insured, in which case it remains subject to Georgia insurance law.

VI. CONCLUSION

Because failing to recognize a lien could result in significant financial repercussions for the defendant in a personal injury action, defendants and their attorneys must take steps to identify any lien or subrogation interests early in the process of evaluating a claim. Specifically, defendants and their attorneys (as well as all other persons involved in a personal injury action) should identify parties who might have a lien or subrogation interest against any possible judgment or settlement proceeds (i.e., parties who have paid for or provided medical services to the claimant), notify any such potential lien holder(s), include the lien holder(s) in the negotiation process where possible, and

³² Id. § 33-24-56.1(f)

³³ 29 U.S.C. § 1144(a) (2000)

³⁴ Id. § 1144(b)(2)(A); See also FMC Corp. v. Holiday, 498 U.S. 52 (1990) (stating that employee benefit health plans which are insured are subject to indirect state regulation).

³⁵ Sereboff v. Mid Atlantic Med. Services, Inc., 126 S. Ct. 1869 (2006)

put a sufficient amount of money in trust until the lien(s) can be extinguished or otherwise compromised.³⁶ In addition to protecting defendant insurers against double liability, identifying liens early in the litigation process will expedite the settlement or adjudication process and ensure that a final and complete conclusion is ultimately reached.

³⁶ Roger J. Larue and Daniel Q. Posin, Medicaid, ERISA, and Other Medical Liens Against Personal Injury Recoveries, 51 La. B.J. 334 (2003)