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Are these the "LIEN" years?

SETTLEMENT LIENS & STRATEGIES

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With new rules and ethics opinions concerning how trial lawyers disburse settlements and verdicts in the face of claim against their clients' recoveries, this brief presentation will address strategies for liens from: the Workers Compensation Carrier/Employer; Medicaid/Medicare; ERISA plans; and other parties with an interest in the outcome of the case. More important to our injured clients and their families than the gross verdict amount and the case synopsis in the Lawyers Weekly, is their NET recovery after factoring in all of the liens. Sometimes this "end game" is more complex than we trial lawyers expect.

"It ain't over 'til it's over..." (attributed to Yogi Berra)

We work so hard to conclude a personal injury case on behalf of our clients. We look at legal responsibility, damages and the opposing parties' financial responsibility when we initially take on a case. However, attention must be paid to the disbursement of settlement proceeds, especially in light of the liens against the ultimate recovery that expectations are not realized, it is the trial lawyer who may then become the target of the client's ire, a bar complaint or even a lawsuit increasingly exist in the face of workers compensation benefits, medical care assignments and other economic obligations. The law reporters and newspapers relate the gross amounts of verdicts and settlements, but what our clients really want to know, is how much they will net when all the legal machinations are said and done. And when the clients'

I. Introduction

Where there is limited insurance or other assets, a compromise settlement (because of problems of proof, questionable liability, or other issues), counsel has to be able to address all potential claims against the recovery in a timely and ethical manner. When it is the client, to whom the first duty of loyalty is owed, who attempts to maximize the net recovery at the expense of legitimate creditors, then counsel enters an ethical minefield. The following will attempt to address some of the ethical and practical issues that arise in this increasingly complex area of the law, which might be described as "post trial tribulations..."

II. General overview of some common lien issues

A. Anticipatory Action in light of potential liens:

Practice Tip: Have included in your Retainer language along the lines of the following sentence:

I authorize and direct my attorney to pay any outstanding medical bills, charges, claims and liens, including claims of health care plans, providers and insurers, incurred as a result of the above incident out of any recovery obtained on my behalf.

AND, prior to disbursing the proceeds, the client should sign the following statement, which may be contained at the bottom of the final accounting:

The undersigned client _____ hereby approves of the above disbursements, payments and distribution of proceeds.

B. State Anti-Subrogation law

Some states have "anti-subrogation" statutes that protect the injured insured. For example, Virginia law does not permit motor vehicle liability medical benefit insurers providing hospitalization, medical, surgical or other similar benefits to retain a right of subrogation to recover from a third party for personal injuries to their insured. See Virginia Code section 38.2-2209, 3403.

C. The Workers Compensation Act's Prohibition against Liens, Assignments, etc., except in cases of child support

1. **PRACTICE TIP:** Keep a current copy of your state's Code section prohibiting the attachment or garnishing of comp money in a folder to send to creditors, bill collection agencies and others who might otherwise take adverse action as against a client who is or may be receiving benefits under a workers compensation claim during the tendency of their tort case.

a. **PRACTICE TIP:** Even in cases where there is child support owed, there can be a compromise of the arrearage or alternate forms of payments made.

III. Health Care Provider Liens

A. In General

Health care provider liens probably present the most common issue with regard to the final settlement of a personal injury claim. In many cases, once the attorney sends for medical records, the doctor's office responds with a bill for the copies and an Assignment and Authorization form calling for the health care provider to be paid from the settlement (or verdict proceeds) while agreeing not to pursue the patient / client or refer the matter to collections. Even where counsel has not contacted the physician's office, once the medical provider gets wind of the patient's retention of legal counsel, these forms letter go out, often with the client's signature already affixed ! Evidence tends to suggest that a lawyer does not have to sign these documents to be ethically bound by their contents. The health care providers' expectations and forbearance are akin to detrimental reliance, such that payment is to be made where the bills have been used in the underlying personal injury action and held out as: reasonable in amount and duration, related to the incident in controversy and by referral.

D. Practice tips

Where the health care provider has sent an assignment, and the client or counsel and the client have signed such a document, and the client later wishes to repudiate the agreement, the trial lawyer is placed in a difficult position. Where two or more people are demanding moneys from

the same fund, the trial lawyer is well advised to hold the fund in trust for a reasonable and set period of time, with notice to all interested parties. If they cannot then work the matter out, then counsel may follow a course of action to place the moneys in the court's custody by way of an interpleader. This is one of the few areas of the law where the lawyer has to consider the rights of third parties as well as those of the client.

IV. Workers Compensation Liens

A. The Lien.

Like many other states' statutes, Virginia Workers Compensation Act allows the employer (and its insurer) to be subrogated to the employee's rights to recover against a third party tortfeasor. In other words, when the injured worker sues the person (or entity) that was responsible for causing her on-the-job injury, her employer and its insurance company has a legal right to get its money back.

B. No lien against FIRST PARTY insurance.

*The employer and workers compensation insurer have no right of subrogation against an injured employee's tort recovery under the uninsured motorist provisions of the employee's own motor vehicle policy. Horne v. Superior Life Insurance Co., 203 Va. 282 (1962). Likewise, it would appear that there is no subrogation interest as against other first party benefits (i.e., wage continuation insurance, truck payments coverage, double indemnity life insurance, furniture layaway accidental death, medical payment or medpay, where not specifically excluded by the contract of insurance, etc.) since the right to make a recovery is against an "other party" and specifically addresses *rights against third parties*.*

The employer/insurer would appear to have no subrogation rights against an injured worker's own uninsured motorist coverage. The employee may clearly recover under her uninsured motorist coverage where the workers compensation claim is based upon injuries inflicted by a stranger to the employment. The employer/insurer should not be subrogated to this portion of the employee's recovery and are furthermore not entitled to a credit for it as against future compensation benefits.

C. Consent for the third party settlement

The employer/insurer must generally obtain the approval of the Workers Compensation Commission and the employee before settling a third party tort claim. Likewise, the employee must obtain the consent of the employer/insurer where there is a subrogation interest. The employee who settles her third party claim without the knowledge and consent of employer/insurer impairs their subrogation rights, and further compensation benefits will be forfeited. Safety-Kleen Corp. v. Van Hoy, 225 Va. 64 (1983). An impairment of the right of subrogation through settlement of the tort claim without the knowledge or consent of the employer/insurer results in termination of compensation benefits even though an employer may have knowledge of the pending third party action. Barnes v. Wise Fashions, 16 Va. App. 108 (1993). In order to avoid the risk of early termination of your compensation client's benefits, the

employer/insurer must know of and approve the settlement with the third party tortfeasors. Even where a subsequent non-work related accident exacerbates a compensable injury, settlement of the subsequent claim can impair subrogation rights and, thus, forfeit a claimant's entitlement to future comp benefits. Green v. Warwick Plumbing, 5 Va. App. 409 (1988).

D. Practical Considerations and Potential Help in Settling Virginia Workers Compensation Claims.

The above discussion avoids the question of the timing for these workers compensation subrogation settlements. Frequently, plaintiff's counsel will have an offer to settle the third party case and either an impending discovery or trial deadline. The offer would be acceptable were no comp lien present. Some adjusters, unfamiliar with the case law and statutes discussed herein, simply refuse to negotiate, and demand full payment on their lien, often forcing the tort suit to incur unnecessary expenses and go to an uncertain trial. While the tort claim adjusters and defense counsel easily recognize (and discount for) such factors as contributory negligence, assumption of the risk and mitigation of damages, comp adjusters often focus only on their total indemnity, file maintenance and medical expenditures to date. More troubling is the dilatory comp carrier or clueless TPA. In these situations, it is nearly impossible to adequately advise the injured client, and until recently, recourse has been almost nonexistent. However, help may be on the way.

As an example, new Virginia Code 8.01-424.1 indicates that this section provides that when an employer has a subrogation interest in an employee's workers compensation claim against a third party and the employer fails to consent to a settlement offer acceptable to the employee, the employee may petition the court where the action is pending for approval of the settlement. If no action is pending or the action is pending outside the Commonwealth, the Petition may be filed in any circuit court in which venue lies as to the employee. The court may approve the settlement and after all appeals are exhausted and because the employer's subrogation interest has not been compromised, such approval is deemed consent to the settlement by the employer. While this Code section does not give the court the power to reduce or compromise the amount of the subrogation interest created, it does enable trial counsel to get the case settled and the future compensation entitlement percentage then forwarded to the Commission for calculating future benefits.

1. Practical settlement tips where the comp and third party cases are concurrent.

In practical terms, there are several ways for the injured worker's counsel to proceed to settle the case where there is a third party case and a workers compensation claim. Under some state statutes (i.e., Virginia Code Sections 65.2-309-311), the workers compensation carrier just gets its "lien" paid back and future compensation is modified until the net recovery to the injured employee is exhausted. Once this net recovery figure is attained, then full compensation benefits can be resumed. To do this, counsel can merely write to the Commission's claims Division for a Resumption Order, with the appropriate notice to the employer/insurer.

2. Add Social Security Disability, LTD, etc. to the mix !

Careful calendaring and followup are vital to tracking these types of cases, and often these files must be kept for many years, unlike simple liability claims with no ancillary comp claims. Counsel should also be aware of the interplay between Social Security Disability benefits and workers compensation, for which a set-off can be triggered, in those cases involving long-term disability and serious injury. While beyond the scope of this article, counsel should advise the claimant (or refer her to counsel who regularly handles claims before the Administrative Law Judges) who may be eligible for such federal disability (as opposed to retirement) benefits of the pros and cons in settling the underlying state workers compensation claim.

A. What IS covered by the workers comp lien

1. Indemnity benefits
 - a. Periodic or lump sum payments for Total and/or Partial wage loss and permanency;
2. Medical benefits (i.e., treating and testing sources);
3. Expenses that are reasonable and related to medical care (i.e., prescriptions, medications, travel to and from health care providers, authorized changes to the home, etc.).

B. What is NOT properly covered by the Workers Compensation Lien:

1. Insurance defense counsel costs and fees;
2. Insurance Medical Examinations or reports;
3. Privately retained vocational rehabilitation;
4. Outside nurse / case manager fees;
5. Insurance investigator expenses;
6. File maintenance, deposition, Commission Awarded penalties, interest, Hearing transcript fees, etc.

C. Practice Tips when there is a Workers Compensation Claim and a Personal Injury Case:

1. Make sure the comp carrier provides you with ALL third party investigation materials at the outset. The liability / motor vehicle carriers subpoena the comp files, so should you ! Photographs of the scene, taken by the comp carrier's investigator, before remedial measures are taken, can be invaluable. And, *discovery as against the employer, premises or other parties in the comp claim*, can be done without the liability insurance adjuster or defense counsel's interference !

2. Review the **official** Workers Compensation file. You do not want to be claiming one rate of pay in the tort case, another in the comp claim and a third in the Social Security Disability file. Getting a printout of your client's annual earnings from the Social Security Administration can help to prove consistent earnings and give a foundation for economic testimony at trial (and average pre-injury average weekly wage computations).

3. Have the compensation carrier itemize its lien, not just send you its payment computer printout. Weed out those items that you need not reimburse, and also compare as against your office's own itemization of special damages.

4. An Award or Order from the Compensation Commission or Board may not be necessary for employer or comp carrier to have valid lien, even where client is time barred from further workers compensation benefits ! An equitable lien may attach, so be aware of this silent "I.O.U."

5. Remember, unlike automobile and other tort cases, settlements of compensation claims must generally be approved by the state Workers Compensation Commission or Board, which reviews the paperwork to determine if the compromise of the claim appears "in the best interests of the claimant." This usually requires an in state attorney and is for your client's protection.

IX. ERISA Claims

Under ERISA and self-insured medical benefit plans, subrogation and reimbursement provisions generally are enforceable if the plan language is strictly complied with, even in those states, like Virginia, with anti-subrogation statutes. See, e.g., FMC Corp. v. Holliday, 498 U.S. 52, 511 S.Ct. 403, 112 L.Ed.2d 356 (1990) (ERISA pre-empts state anti-subrogation laws governing reimbursement of medical liens.)

A. Preliminary practice tips

A. Where employee benefit plan and/or insurance company that either insures the plan or administers the plan seeks reimbursement of the medical bills paid by the plan as provided by ERISA, plaintiff's counsel is advised to consider :

1. Sending a letter detailing Virginia's anti-subrogation statute and requiring evidence (and documentation) that the plan is indeed a valid ERISA plan.

2. If documentary evidence demonstrates that the plan is an ERISA plan, evaluate it carefully to make sure that it complies with the rules governing such plans and that it is not one of the funds which are exempt from ERISA coverage.

a. NOTE: A plan may be a self-funded employee benefit plan and an ERISA qualified plan, but it may not have the necessary subrogation or pay-back language.

3. Request early the plan documents, and be aware that there are penalty provisions to the Plan for failure to timely provide the documentation to a participant, which may cancel out their asserted ERISA lien !

X. Conclusion

The trial lawyer's office should take great pains not only to analyze sources of coverage for their personal injury clients, but also identify potential lien holders who may figure into the ultimate resolution of the tort claim. Early analysis of final distribution issues may avoid the plaintiff being forced to go to trial in a case that is better off being settled, and incurring needless costs that the client would not otherwise have had to bear. A written checklist and final accounting should enable the busy practitioner to consistently cover all the areas of potential legal and ethical problems on behalf of their clients and interested third parties.

The new Rules of Professional conduct call upon a trial lawyer's problem solving abilities as well as our advocacy skills in resolving disputes between not only the plaintiffs we represent and the defendant tortfeasors, but lien holders, medical caregivers, health plan administrators and other entities with competing interests in the ultimate outcome of our efforts. No longer is the trial lawyer the lone gunslinger on behalf of the injured client, blind to the interests of third parties. The new rules and new forms of interests on our clients' recoveries require a more expansive view and more creative problem solving skills. Ascertaining the potential liens early in a claim can help to prevent misunderstandings or delays at the conclusion of the case. By understanding the sources of likely debts on a personal injury recovery, the trial lawyer can help bring a case to a successful end. We often have the ability to make for a happy ending after the trauma our clients and their family have been through; let's not let it slip through our fingers by neglecting the liens on our clients' ultimate recoveries.

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