ALFA INTERNATIONAL
2015 TRANSPORTATION SEMINAR
April 29 – May 1, 2015 – The Hotel Del Coronado – Coronado, California

THIRD PARTY LIENS: HOW TO MANAGE THE DETRIMENTAL IMPACT LIENS IMPOSE UPON SETTLEMENT NEGOTIATIONS

Matthew D. Jacobson
*Moderator*
Whitfield & Eddy, PLC
Des Moines, Iowa
jacobson@whitfieldlaw.com

Mary Beth Haltom White
LEWIS, THOMASON, KING, KRIEG & WALDROP, PC
Nashville, Tennessee
mbwhite@lewisthomason.com
I. Overview

There are many competing interests for potential recovery in a personal injury lawsuit. If it is a workplace accident, the worker’s compensation insurance carrier for the employer will be interested in recouping payments made under the policy against a third party tortfeasor. Medical insurers which have paid medical bills for injured parties also desire to recover those payments from third party tortfeasors. And, as we are all painfully aware, the federal government is extremely interested in recovering any payments made to someone whose injuries may have been caused by a third party. Finally, the attorney for the injured party will typically claim 25% to 40% of an injured party’s tort recovery in the form of contingency fee recovery.

The sum of all these claims often add up to a rather disheartening “bottom line” recovery to an injured plaintiff. Quite frequently, the injured plaintiff faces a situation in which he or she recovers less than 50% of the settlement amount and is dismayed by the fact that other “non-injured” entities walk away with a significant portion of the settlement amount. While some plaintiff’s counsel are up-front with their clients about this possibility from the outset of a lawsuit, it is not infrequent that settlement discussions are slowed due to comments such as “my client was expecting to net more out of the lawsuit” or “my client won’t settle unless she receives $X out of the settlement.”

Navigating through potential lien claims can be a torturous exercise for defendants and their counsel when they are looking to resolve a lawsuit via settlement. In deciding to settle a case, a defendant is weighing the risks of exposure if the case were to go to trial, the costs of going forward with trial and the cost-certainty associated with a settlement. Efforts to settle a case can be scuttled quite quickly by an injured plaintiff who is unprepared to face the ramifications of existing liens or who is unprepared for the amount of liens that may exist. Similarly, it is important for defense counsel to fully understand what liens may exist and how those liens might be compromised and/or exploited during the settlement process. The breakout session will focus on the impact that various liens may have upon the settlement process and offer some practical advice and/or guidance as to how to best manage the existence of those liens.
II. Medicare Liens

The Medicare Secondary Payer Act ("MSPA") has caused significant headaches in the settlement process. Whenever a Medicare recipient receives settlement funds, the MSPA creates an obligation to not only reimburse Medicare for the care it paid for related to the claim but also, in certain situations, to set aside certain amounts of a settlement to pay for future medical care. Thus, the process of resolving a liability claim involving medical treatment paid by Medicare requires the parties to consider Medicare’s interests with regard to the settlement of the medical portion of the claim. The intent of the MSPA is to prevent settling parties from shifting the responsibility for payment of medical expenses to Medicare.

This is a two-step analysis, requiring the parties to consider both (1) medical expenses already incurred and paid by Medicare, which are known as conditional payments, and (2) the possibility of future medical expenses yet to be incurred that may be payable by Medicare, which are sometimes referred to under the catch-all phrase "Medicare Set Asides." The Center for Medicare and Medicaid Services ("CMS") is charged with the responsibility of identifying the amount of Medicare liens and enforcing Medicare lien rights.

Although the MSPA statute and related federal regulations can be difficult to interpret, it is very clear that CMS can pursue recovery from anyone who receives payment from a settlement resolving medical liability where the burden is improperly shifted to Medicare. Such recovery efforts may be directed not only towards the Medicare beneficiary and the insurance carrier, but also to self-insureds, attorneys who are paid fees from the settlement, medical providers, or anyone else who has received a portion of a third-party payment. Because Medicare is not a party to the settlement, it does not consider itself bound by the terms of settlement. Therefore, Medicare may pursue recovery, regardless of the amount of the settlement, if it does not believe the parties adequately considered Medicare’s interests. It is important to note, however, that CMS has no legal right to seek reimbursement or pursue subrogation until the medical portion of the claim settles. Thus, until the parties either reach a settlement agreement or the Court renders a final decision, there can technically be no overpayment by Medicare.

When trying to settle a case involving a Medicare eligible plaintiff, it is incredibly important that plaintiff’s counsel has crossed his/her “t”s and dotted his/her “i”s with respect to notifying Medicare of the potential for recovery from a third party. Defense counsel should remind Plaintiff’s counsel of the need to contact Medicare’s Secondary Payer Recovery Center ("MSPRC") to start the process of identifying what “conditional” payments for which Medicare may seek reimbursement out of any settlement proceeds. The process of indentifying “conditional” payments takes approximately two months and obtaining a final listing of “conditional” payments can take even longer if there is a dispute over whether a particular “conditional” payment is related to the underlying lawsuit.

Attempting to settle a lawsuit involving a Medicare recipient when opposing counsel does not have a Conditional Payment Letter from the MSPRC is fraught with peril.
Given that the process of identifying the amounts sought to be repaid by the MSPRC may take several months, it is impractical for any settlement to be finalized (i.e. check issued to the plaintiff’s lawyer) until the lien amount is finalized. The settlement documentation should identify that the plaintiff’s counsel has obtained a lien amount from MSPRC, that the lien will be paid from settlement proceeds and that Medicare’s present and future interests have been considered when reaching the final settlement.

Consequently, in order to best ensure that settlement efforts are fruitful, a defendant and its counsel should ensure that opposing counsel has fully satisfied all requirements imposed by Medicare before any settlement efforts are pursued.

After a settlement has been reached, the MSPA requires plaintiff’s counsel to contact the MSPRC to provide information regarding (1) date and amount of settlement; (2) attorney’s fees and costs; and (3) copy of settlement agreement. After this information is received, the MSPRC will issue a Final Demand Letter. Plaintiff’s counsel will then pay the final amount demanded by the MSPRC.

An issue that can arise post-settlement and which should be addressed during settlement discussions is the timing for issuing the settlement check. Will the settlement check be issued only after the Final Demand Letter is received from the MSPRC or will the settlement check be issued immediately? If the latter, it is likely the best practice to secure a written agreement from plaintiff’s counsel that it will hold a specified amount in plaintiff’s counsel’s trust account to cover claims for reimbursement by the MSPRC. Addressing those issues at the time of settlement as opposed to weeks after the settlement negotiations have concluded will avoid potentially difficult disputes and uncomfortable motion practice in court.

III. Worker’s Compensation Liens

Plaintiffs who are injured during the course of employment will, in most instances, receive compensation through their employer’s worker’s compensation insurance policy. The injured party will have medical bills paid; receive lost income and compensation for the type of injury (including temporary total disability (“TTD”) and/or permanent partial disability (“PPD”). The amount of compensation will depend upon the state in which the person was injured or employed.

Recovery available to an injured person under worker’s compensation statutes is generally less than what could be obtained in a civil lawsuit against a potentially at-fault third party. In general, potential compensation to an injured person in a civil lawsuit for non-economic damages such as pain and suffering and loss of normal life exceeds compensation for TTD and/or PPD in a worker’s compensation action. Consequently, financial motivation exists for an injured person (and an injured person’s attorney) to pursue additional recovery against any potentially at-fault third party.

Where an injured plaintiff files a lawsuit against a third party after receiving worker’s compensation benefits, the worker’s compensation insurance carrier will almost
certainly claim a lien on any settlement proceeds received from the third party. All states incorporate subrogation provisions into their worker’s compensation statutes and generally provide for allocation of how attorney’s fees are to be paid from any recovery on a worker’s compensation lien. For example, in Pennsylvania, Section 319 of the Worker’s Compensation Act reads, in relevant part, as follows:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of his employee . . . against such third party to the extent of the compensation payable . . . [R]easonable attorney’s fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employee . . . the employer shall pay that proportion of attorney’s fees [and costs] that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee . . . and shall be treated as an advance payment by the employer on account of any future installments of compensation.

With notable exceptions where an employer’s conduct can be characterized as intentional, willful or wanton or reckless, an injured employee’s sole recourse against his or her employer is through the applicable worker’s compensation statute. Unfortunately, in many states, an employer’s protections are absolute and an employer cannot be brought into the case as an additional defendant – even if the employer’s conduct may have caused some or all of the alleged injury. In contrast, some states allow for an employer to be named as a third party defendant for contribution purposes. (I.e. Illinois) In those states, the employer’s potential liability is limited to what was paid to the injured employee in the worker’s compensation action. In those instances, while the employer does not face potential additional liability, an employer found to be at fault will have its recoverable lien reduced, or in some cases, eliminated. This could prove to be a valuable tool for settlement purposes in that it provides a mechanism to obtain lien waivers.

However, it is also important to fully grasp the strategy implications of bringing an employer into a lawsuit as a third party when the employer’s potential liability is capped and the employer’s liability must flow through a defendant’s liability. You do not want to be caught in a situation where the defendant is left paying a large verdict because (1) the jury is mad at the employer’s conduct; (2) the jury allocates most fault to the employer but (3) the employer’s damages are capped by the amounts paid through worker’s compensation. In those instances, it may be much a much wiser strategy to keep the employer in the case through settlement discussions but to dismiss the employer before trial and adopt the “point at the empty chair” defense at trial.

When it comes time to begin serious settlement negotiations, you will want specific information pertaining to the actual lien claimed by the worker’s compensation carrier. It
is often best practice to obtain information about the employer’s worker’s compensation carrier and, if possible, subpoena information from the insurance carrier to obtain as much information as possible (without opposing counsel sanitizing the information). Unless and until you have definitive information pertaining to the worker’s compensation lien, it will be difficult to formulate a settlement strategy.

If you are going to be participating in mediation or a court-sponsored settlement conference, it is incredibly helpful to require the participation of the worker’s compensation insurer’s “decision-maker” at the conference. Quite often, a settlement will hinge not only on the plaintiff being flexible with his/her demands, but will require compromise on the worker’s compensation carrier’s part. Having the lien holder’s “decision-maker” actively participate in the mediation or settlement conference likely increases the chances that a compromise can be reached. While it is always better to have the insurer’s “decision-maker” attend in person, that is not always practical or even possible. In those cases, you should insist that the lien holder’s “decision-maker” be available by phone to speak directly with the mediator or the judge presiding over the settlement conference.

When facing a situation where the plaintiff is an injured employee and there is a worker’s compensation lien, there are some key issues to address which will help manage/ease the settlement process:

- What does the venue’s statute provide for recovery of worker’s compensation payments?
- Does the venue allow for a defendant to name the employer as a third party defendant?
- Does the venue allow or require a worker’s compensation lien holder to intervene into a lawsuit brought by the injured employee against a third party?
- Is the injured plaintiff’s lawyer “in charge of” recovering the worker’s compensation lien or is there outside counsel working for the worker’s compensation insurance carrier?
- Is the worker’s compensation lawsuit still proceeding?
- If not, what are the terms of the settlement? Is there a provision for future payments?
- If the case is still pending, what payments have been made to date and for what types of compensation (TTD/PPD, etc.)? What is holding up the worker’s compensation resolution? (Future medical care? Extent of disability?)

Having a firm grasp on all of these issues will only assist in the settlement process and minimize the potential headaches which could arise as the parties try to reach an accord.

**IV. Physician/Hospital/Health Insurance Liens**

In just about every personal injury lawsuit, the injured plaintiff will have incurred medical treatment and associated medical bills. If the injured plaintiff possesses medical
insurance coverage, there will be a lien asserted by the insurer. If the injured plaintiff is uninsured, the health care provider will likely seek to recover all medical bills by asserting a lien on the injured person’s recovery.

As part of the discovery process, you will quickly learn not only the specifics of the medical care provided to the injured plaintiff but also (1) the amount billed by health care providers; (2) the amount paid to the health care providers by an insurer or the plaintiff and (3) whether any balance exists that must be paid by the plaintiff or whether the health care provided “wrote off” the balance pursuant to an agreement with the plaintiff’s insurance provider.

When analyzing the potential exposure that may be faced by a defendant at trial in a particular lawsuit, it is important to understand whether you are in a venue that allows for a plaintiff to recover the value of medical charges that were “billed” (i.e. Illinois) or whether the plaintiff is limited to recover the value of medical bills that were actually “paid.” (i.e. Iowa). Just as important, when analyzing the potential settlement value of a particular lawsuit, it is necessary to have a firm grasp on all of the potential liens that may have arisen as a result of insurance payments or unpaid medical bills. Once you have ascertained all of the liens that are being claimed by insurers or health care providers, you can start to formulate a settlement strategy.

Unfortunately, “access” to the health care providers or health care insurers is usually controlled by plaintiff’s counsel. Consequently, a defendant and its counsel must, in large part, rely upon plaintiff’s counsel to directly negotiate liens with health care providers or health care insurers. However, despite not having “access” to the health care providers or health care insurers, there are some methods by which a defendant can best position itself when it comes to settlement negotiations where medical liens may present an impediment to settlement.

When dealing with health care liens, it is important to understanding the particular state’s approach to health care liens. A defendant and its counsel must understand how a particular state provides for “perfection” of a enforceable health care lien. Next, if there is a valid lien, it is important to have a thorough understanding of how does the particular state or venue handle enforceability of those liens. For example, in the Illinois Healthcare Services Lien Act provides that all health care provider lien holders may not recover more than 40% of an injured person’s total recovery – including verdict, judgment or settlement. No single health care provider can recover more than one-third of any verdict, judgment or settlement. Further, case law interpreting the Illinois Healthcare Services Lien Act holds that the 40% “cap” applies after attorney’s fees and litigation costs are deducted from the injured person’s recovery.

Thus, in appropriate situations and venues, where there are large health care liens which will greatly undermine an injured plaintiff’s “net” recovery, a defendant and its counsel can use their understanding of the underlying statutory scheme to greatly diminish the amount of the lien being claimed.
With respect to health care insurance liens, a similar approach applies. Having a thorough understanding of what statutory limits may be placed on what a health care insurer seeking to recover on a lien. For example, in California, a health insurer's lien may be no more than the cost to perfect the lien (i.e. lien less reasonable attorney's fees) and an insurer's lien claim may not be exceed one-third of the total recovery. Further, in Illinois, an insurer's lien claim must be reduced by the amount of the injured person's comparative fault.

In short, when preparing to engage in settlement negotiations with opposing counsel, a defendant and its counsel should not only know the health care parties that are asserting liens and the amount of the liens being asserted, they should be well-versed in what amounts may be recoverable and what amounts may not be recoverable. Having a firm grasp on the enforceability of lien claims will greatly assist a defendant and its counsel trying to reach an advantageous and acceptable settlement of the injured person's claims.

V. Attorney's Liens

Perhaps one of the most frustrating liens faced by a defendant and its counsel is the attorney's lien claimed by the plaintiff. In almost every circumstance, a plaintiff's lawyer will seek between 25% and 33.3% of any settlement – regardless of the stage of the litigation or the amount of time or work invested by plaintiff's counsel.

Because the attorney's lien is a matter of contract between a plaintiff and his/her attorney, there is often very little that can be done by a defendant and its counsel to impact the amount of the fees claimed by plaintiff's counsel. Preparing a solid defense and raising the risk of a defense verdict may be the best way to convince plaintiff's counsel that he/she may want to reduce his/her percentage of recovery in order to secure a settlement with a “net recovery” acceptable to the plaintiff. There may be nothing more convincing to a plaintiff's lawyer to compromise his/her fees than running the risk of not getting paid for his/her efforts in the case.

In certain high damage or death cases, perhaps the best method for limiting fees claimed is seeking an early mediation or settlement conference. In those situations, the plaintiff's lawyer may not have significant time into the case and, at the appropriate time in the mediation, you can approach the mediator to suggest that it is better for the plaintiffs to settle for the amounts being offered rather than pursuing prolonged litigation. You can also point out that the plaintiff’s attorney’s fee claim may be the largest “hurdle” to achieving settlement and that, given the amount of time that is likely invested in the case and the amount of the settlement offer, the mediator should approach plaintiff's counsel about the possibility of reducing the percentage of recovery. However, the amount of plaintiff's counsel’s fees is usually a “prickly” issue that should be handled with great care. If handled inappropriately, it may only serve to hinder settlement discussions.