



Liens galore

AN UPDATED SUMMARY OF LIEN CLAIMS FOR PLAINTIFFS' ATTORNEYS

General lien claims information

The subject of lien claims is vast. No single article can properly cover the universe of lien claims, their nuances and applications. Although this article primarily concerns lien claims for medical services provided to an injured person, general information is provided on other lien claims. Civil Code section 2872 defines a lien as “a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for performance of an act.”

Lien claims can be contractual, statutory or equitable. All require resolution, and the new California Rules of Professional Conduct sets forth ethical requirements for lien holder protection. (Rule 1.15.) Here is an updated summary of the liens a plaintiff's attorney must be familiar with.

Hidden liens

The Business Law Section of the State Bar investigated California and federal lien laws. Its findings were summarized in its 2010 report entitled “Hidden Liens Report.” The last version of the report is dated August 2013. An updated report is currently being prepared. The report can be obtained from the section now known as the Business Law Section of the California Lawyers Association (CLA). (www.calawyers.org/section/business-law)

The report's Table of Contents sets forth 155 lien codes in six lien categories: Sales transactions; Performance of services; Litigation; Agricultural; Governmental, including tax liens; and Personal property.

California Code sections

The California Civil Code (§§ 2872-3081) has several lien sections of import. They include: Lien definitions, creation, effect, priority, redemption and extinction (§§ 2872-2909); Health plan lien claim deductions (§ 3040); Hospital Lien Act (§§ 3045.1-3045.6); Cleaners (§ 3066); Towing and storage (§ 3068.1); Jewelers (§ 3052a); Buyers of real property lien (§ 3050); Sellers of

real property lien (§ 3046); and Design professional and mechanics liens (§§ 8300-8494). The California Commercial Code, Divisions 8 and 9, has a large section on investment securities liens.

Using liens to prove the value of medical care

In 2011, the California Supreme Court held a tortiously injured plaintiff with healthcare insurance may *not* recover past injury-related medical economic damages that exceed the amount *paid* by the injured plaintiff's insurer. (See *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566.) In contrast, the measure of economic medical care damages for an *uninsured* tortiously injured plaintiff typically turns on the reasonable value of the medical care rendered. (See *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1330-1331.)

In *Pebley v. Santa Clara Organic, LLC*, (2018) 22 Cal.App.5th 1266, Pebley, was a tortiously injured plaintiff. Pebley had health insurance, but he chose to have injury-related healthcare services on a *lien*, with medical providers *outside* of his health insurance coverage. Defendant alleged Pebley's medical billings should be limited to the dollar amount his health insurer would have charged for injury related healthcare, as in *Howell, supra*. The *Pebley* court disagreed. It held Pebley can proffer the lien claims for the healthcare actually received; i.e., Pebley was free to choose any healthcare provider to treat his injuries, and he was not bound to use his healthcare insurance to mitigate his damages.

Liens created by contract

Contractual liens

Liens created by contract can be inferred from terms or specifically set forth. A typical medical lien claim, for example, can be found in an agreement to provide injury-related healthcare that defers payment or reimbursement until the patient's tort case is resolved. Contingent-fee attorneys typically have

lien claim provisions in their retainer contracts. An explanation of the contractual terms “lien,” “subrogation” and “reimbursement” is discussed in *21st Century Ins. Co. v. Superior Court (Quintana)* (2009) 47 Cal.4th 511.

Automobile Medical Payment lien provisions (Med-Pay)

A person who contracts for an automobile liability insurance policy can obtain, under that policy, healthcare coverage for injuries sustained during an automobile collision. Coverage applies to all persons in the insured vehicle. Coverage may also extend to injuries sustained by the contracting insured as a pedestrian. It is no-fault insurance.

This coverage provision is known as “Med-Pay.” It is strictly contractual. No statute mandates such coverage. An insurance carrier seeking reimbursement must have such right set forth in the insurance contract. (See *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 272.)

Civil Code section 3040 provides a statutory reduction and a cap on a health plan's contractual lien

The code is entitled: “Lien for money paid or payable by insured or enrollee for health care services provided under health care service plan contract or disability insurance policy; limit on account.” Section 3040 has many controls and a cap on the health plan's ultimate lien recovery.

Subdivision (a) of section 3040 sets forth the types of health plan entities bound by the code. Such entities broadly include health maintenance organizations (HMOs), health insurance companies, including preferred provider organizations (PPOs), and other medical groups qualified under the Knox-Keene Health Care Service Plan Act of 1975 (§§ 1340-1399.818 and Title 28 of California Code of Regulations). A “disability insurance policy subject to Insurance Code” is also bound by section 3040's lien reduction and recovery cap rules.

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Liens created under federal law

Basic federal law

Under the Federal Medical Care Recovery Act, all agencies of the federal government are given statutory powers to recover the reasonable cost of injury-related medical care to a service member, retiree, or dependent of a service member necessitated by a third-party tortfeasor. An automatic statutory lien claim is created against all third-party liability claims. (FMCRA) (42 U.S.C. §§ 2651-2653, amended 2006.)

The injured beneficiary has an affirmative duty to notify the proper federal government lienholder of the potential lien claim. (28 C.F.R. § 43.2) The federal government can waive or compromise its lien claim. (32 C.F.R. § 757.19, and 42 U.S.C. § 2652.) It has three years to initiate its tort rights, and it is not subject to a state's statute of limitations, when it brings a collection action under the FMCRA. (See *United States v. Gera* (3rd Cir. 1969) 409 F.2d 117, 120; see also 28 U.S.C. § 2415(b) establishing a three-year statute of limitations, after the federal government's right of action first accrues.)

The federal government's claim is only for economic damages regarding injury-related medical care (and pay loss for uniformed military). The injured party's rights against the tortfeasor for noneconomic damages, such as pain and suffering, and other economic damages, are separate claims from the federal claim. (42 U.S.C. § 2652(c).) State substantive law determines whether tort liability exists.

U.S. Department of Veterans Affairs (VA) and CHAMPVA (for spouses and children)

Injury-related medical care provided by the VA to a VA beneficiary caused by a third-party tortfeasor is required to be compensated under the FMCRA. A VA beneficiary is generally a person retired or discharged from military service. VA recovery from third-party liability is limited to nonservice-connected injuries. (38 U.S.C. § 101(17).)

TRICARE (formerly CHAMPUS)

The Department of Defense provides medical, dental and medication services for active military personnel and their families through TRICARE. (10 U.S.C. § 1072(2)(H)(7).) These healthcare services are administered at government facilities or nonmilitary facilities. Coverage can be obtained for extended family members, retirees, and many other beneficiary categories.

TRICARE is like a giant insurance company, with coverage provided to all seven uniformed services; i.e., Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, National Oceanic and Atmospheric Administration. TRICARE has the same lien rights as other federal government healthcare providers. (5 U.S.C. § 3106.)

U.S. workers' compensation

A federal lien is created for benefits provided to a federal employee who is injured by a liable third party. (5 U.S.C. § 8132.) The federal government does not have an independent right of action against the responsible tortfeasor; therefore, the injured employee may be required to assign to the government a portion of his/her interest in the third-party claim to avoid termination of future government benefits. (5 U.S.C. § 8131(b).)

Original (traditional) Medicare

Medicare is a program that allows Social Security beneficiaries to have medical insurance. Medicare-insured individuals (retired and disabled) suffering injuries caused by another can obtain Medicare coverage for the injury. An injured Medicare beneficiary is accountable to repay Medicare upon recovery from a third party or the third party's insurance carrier. Note that Medicare's recovery rights apply only to "original" Medicare; i.e., Plan A (hospitalization) and Plan B (medical care). Other Medicare plans are discussed in the following sections.

Medicare considers itself a secondary payer; i.e., the primary payer is the tortfeasor and/or the tortfeasor's insurance carrier (and others) under the

Medicare Secondary Payer Statute (MSP). (42 U.S.C. § 1395y(b).) The Centers for Medicare & Medicaid Services (CMS) is responsible for managing Medicare and collection of original Medicare's lien claim. Medicare has an automatic lien on the third-party recovery that is superior to any other lien claim.

Medicare regulations allow for double recovery directly against the third party and the third party's insurance carrier for failing to honor the Medicare lien claim. Additionally, both the injured Medicare beneficiary and his/her attorney are subject to double recovery payable to Medicare, if they fail to notify and honor a Medicare claim. (42 C.F.R. § 411.24(c) and (g).)

Medicare Advantage

Under Part C of the Medicare Act, a Medicare beneficiary can obtain Medicare healthcare from a private insurance company. This program is known as Medicare Advantage, and the insurance carrier is known as a Medicare Advantage Organization (MAO).

About 40% of individuals qualifying for Medicare opt out of original Medicare to join an MAO (Part C) program. Various private insurance companies (Scan, Blue Cross, Kaiser, Humana, etc.) provide all of the benefits allowed under "original" Medicare. (42 USC § 1395w-21 through § 1395w-29.) They may also provide additional benefits, such as prescription drugs, to entice the Medicare-qualified person to an exclusive contract with the MAO. The Centers for Medicare and Medicaid Services (CMS) pays the (MAO) a fixed formula for each Medicare beneficiary enrolled in the proffered Medicare Advantage program.

A Third Circuit case, *Avandia Marketing etc. adv. Humana Medical Plan* (3rd Cir. 2012) 685 F.3d 353, cert. den. (2013) 569 U.S. 918, held an MAO has the same lien enforcement rights under the Medicare Secondary Payer Act (MSP), 42 U.S.C., section 1395y(b)(3)(A), as allowed by original Medicare against a beneficiary or third-party tortfeasor/

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carrier (primary payers). Collection, however, is handled strictly by the MAO or an MAO-contracted collection agency, instead of CMS.

Under *Avandia Marketing*, the MAO has a private cause of action against primary payers and double recovery rights, as allowed under original Medicare's MSP rights. (42 U.S.C. § 1395y(b).) The 9th Circuit, however, allows an MAO's lien-claim enforcement only if the MAO contract with the Medicare Advantage beneficiary so permits. (See *Parra v. PacifiCare of Arizona, Inc.* (9th Cir. 2013) 715 F.3d 1146, 1149.)

Medicare Part D, prescription drugs

Under Part D of the Medicare Act, prescription drugs are obtainable by a Medicare beneficiary through private insurance carriers. Case law is scant on the lien claim rights of a Part D insurance company. It is likely, however, the MSP's (42 U.S.C. § 1395y(b)) lien claim rights will apply to the benefit of a Part D insurance company, in the same manner as it applies to a Medicare Advantage insurance carrier.

Medicaid

Medicaid is a welfare public assistance program, and it is "means" tested. (42 U.S.C. § 1396a. and 42 C.F.R. § 433.145.) Healthcare for those who qualify in California is administered through the California Department of Health Care Services' Medi-Cal program. (Welf. & Inst. Code, §§ 14000-14198.) All Medi-Cal lien claims are to follow the federal Medicaid rules and case interpretations of the Welfare and Institutions Code, as set out in the Medi-Cal section of this article (below).

Other federal codes

Other applicable federal codes and regulations include: Mandatory Victims Restitution Act (18 U.S.C. § 3663 et seq.); and Dependents' Medical Care Act (10 U.S.C. § 1071 et seq.).

Employee Retirement Security Act (ERISA)

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., allows an employer to self-fund

healthcare for its employees. ERISA is not a federal- or state-provided medical provider or insurer.

Basically, *if* an employer's ERISA healthcare plan *contract* requires reimbursement for medical benefits paid for a tortuously injured employee, the injured employee is responsible to repay the plan the *entire* amount of the ERISA lien claim upon recovery from a tortious third party. Some cases have required the employee to pay the *entire* amount of the ERISA lien claim, even if the recovery, after deduction for attorney fees and costs, does not provide enough of a fund to repay the entire lien claim. (See *Wal-Mart Stores, Inc., v. Shank* (8th Cir. 2007) 500 F.3d 834.)

Federal Employee Health Benefits Act (5 U.S.C. § 8901 et seq.)

The federal government generally provides employee healthcare insurance coverage with carriers controlled by state regulations. Thus, reimbursement and lien rights are governed by *state law*.

Liens created under California law

Hospital Lien Act (HLA)

The HLA, Civil Code sections 30451-30456, gives hospitals that provide emergency care to an injured person a right to be compensated by the *responsible* third party or that party's insurance carrier for the *reasonable and necessary* charges incurred by the tortuously injured patient. (§ 3045.1.) (See *State Farm Mutual Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1469.) All sections of the HLA should be read to understand that the lien is effectuated on a third party, and/or that party's insurance carrier, for injuries tortuously caused to the injured hospital patient. Service of the lien claim must follow the strict rules of the HLA. (§ 3045.3.)

The hospital's lien rights include emergency care and *ongoing* care (including hospitalization), even if there is a gap of time between the emergency care and the follow-up care. Note, however, the injured person who received the hospital care *may* remain liable for the hospital bill, if the liable third party or his

or her insurance carrier fails to properly assert and collect its lien claim.

Medi-Cal benefits

Medi-Cal is an extension of the federal Medicaid law. It is designed to provide health care to needy persons. California gets federal Medicaid funds to support its Medi-Cal program, and California must adhere fully to the federal Medicaid Act.

Medicaid rules preempt California rules. (42 U.S.C. §§ 1396-1396v.) Although Medicaid has an "anti-lien" provision, Medicaid law requires states to seek reimbursement for medical expenses in third-party tort actions. (Welf. & Inst. Code, § 14124.70 et seq.) The injured beneficiary's attorney is allowed a 25% fee from Medi-Cal's recovery and a pro rata share of litigation costs. (§ 14124.72, subd. (d).)

The value of the Medi-Cal lien claim is dependent on a percentage ratio to the value of the case. This ratio percentage was established by the U.S. Supreme Court in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268. Based on *Ahlborn*, the California Legislature amended Welfare and Institutions Code section 14124.76 to require California courts to be "guided" by *Ahlborn*. "Expressed mathematically, the *Ahlborn* formula calculates the reimbursement due to the total settlement divided by the full value of the claim, which is then multiplied by the value of benefits provided." (*Aguilera v. Loma Linda University Medical Center* (2015) 235 Cal.App.4th 821, 828.)

Medi-Cal lien rights are superior to all lien claims, except for a Medicare lien claim. When Medi-Cal pays health insurance *premiums* for a Medi-Cal beneficiary to a private insurance carrier, Medi-Cal's statutory lien is limited to the *premiums* paid. (*Moore v. Kaiser Foundation Health Plan, Inc.* (1997) 57 Cal.App.4th 178.)

Special needs trust

Probate Code sections 3600-3612 allow a special needs trust beneficiary to receive Medi-Cal benefits (and other

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welfare benefits) during the life of the trust, and Medi-Cal has a statutory lien for the benefits paid. The total lien amount is to be reimbursed to Medi-Cal at the termination of the trust. Other welfare agencies that provided benefits to the trust beneficiary may also claim an end of trust lien claim. A special needs trust usually terminates at the death of the injured beneficiary.

California Children Services (CCS) benefits

When these benefits for healthcare to a child injured by a tortfeasor are paid pursuant to Health and Safety Code section 123982 et seq., an automatic lien is allowed on the proceeds of a third-party recovery by way of judgment, award or settlement. Unlike Medi-Cal liens, there is no reduction for attorney fees and costs. (See *Tapia v. Pohlmann* (1998) 68 Cal.App.4th 1126.) The statutory lien claim is for past and future benefits.

County health facility medical provider

A county health facility that provides injury-related healthcare to a patient injured by a tortfeasor is given lien rights under Government Code section 23004.1 on a *judgment* in favor of the injured plaintiff against the tortfeasor. Thus, a *settlement* is not subject to the lien claim.

Section 23004.1 is held to comport with a *city's* lien claim for medical care provided to a patient injured by a third-party tortfeasor. (See *Chand v. Bolanos* (2015) 241 Cal.App.4th 204.)

Workers' compensation benefits

Regarding benefits paid for a tortiously injured employee, the Labor Code grants an employer or its workers' compensation carrier (1) a direct subrogation right of action against the tortfeasor, (2) intervention into the employee's court action against the tortfeasor, or (3) the right to file a lien claim on an employee's third-party court action against the tortfeasor. (§§ 3601 and 3850 et seq.; also see *Duncan v. WalMart Stores, Inc.* (2017) 18 Cal.App.5th 460, for a current review of an employer's recovery rights.)

For a good summary of workers' compensation liens, employer negligence, *Howell* issues (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541), and Proposition 51 (Civil Code 1431.2) coordination, see *Sanchez v. Brooke* (2012) 204 Cal.App.4th 126.

Victims of violent crimes

California Government Code section 13963 requires a lien on recovery against an assailant for benefits paid by the California Victim Compensation and

Government Claims Board. The lien attaches to all compensation benefits received from any source. A 2016 amendment allows for the injured victim to receive 25% of the recovery, under certain conditions.

Equitable Liens

Court-created liens

Equitable liens are court ordered to do justice and to prevent unfair results. They are typically based on the doctrines of unjust enrichment and estoppel. An equitable lien has been defined in *Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 453, as "a right to subject property not in the possession of the lienor to the payment of a debt as a charge against that property." "[E]quity will deem as done that which ought to be done . . ." (*Ibid.*)

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