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ILLINOIS LAW MANUAL

CHAPTER X

SETTLEMENTS & RELEASES

G. PHYSICIAN AND HOSPITAL LIENS

The Old Law

Prior to July 1, 2003, there were in existence at least eight (8) lien statutes that allowed for various medical service providers to assert a lien against the litigant's recovery. When combined with attorneys' fees, medical liens can obviously further reduce the net amount the litigant would take from the recovery. Typically, each lien statute provided separately that "[t]he total amount of all liens hereunder shall not exceed one-third of the sum paid or due to said injured person on said claim or right of action." Typically, trial courts would adjudicate the total amount of all of the liens to onethird the total settlement or judgment.

However, in the case of Burrell v. Southern Truss, 176 Ill. 2d 175 (1997), the Illinois Supreme Court changed the landscape on the amount potentially due to multiple lienholders.

In Burrell, the plaintiff settled his case for a total of \$8,500.00. His attorney then filed a petition to adjudicate certain outstanding liens arguing that the total amount of the liens exceeded one-third of the settlement. Three of the plaintiff's creditors entered appearances in the proceedings. One provider asserted a lien of \$913.65 under the Hospital Lien Act. A radiologist asserted a lien in the amount of \$473.00 and finally a treating doctor asserted a lien in the amount

of \$1,529.00, respectively, under the Physician's Lien Act. The trial court reduced the total amount of the liens to one-third of the settlement and the lienholders appealed. Following the Appellate Court's affirming of the trial court's decision, the lienholders further appealed to the Illinois Supreme Court.

The Illinois Supreme Court reversed the decision of the appellate and trial courts. Under a strict reading of the Hospital Lien Act and the Physician's Lien Act, the court reasoned that each Act creates distinct liens and that there exists a separate right under each Act to a maximum of one-third of the plaintiff's settlement. The phrase "all liens hereunder," in limiting the amount of liens that may be asserted against a single recovery, refers only to liens filed under each Act, and does not include liens that are asserted under separate provisions. The court based its reasoning on a plain reading of the statute along with the common law concept that where statutes are enacted after judicial opinions are published, it must be presumed that the legislature acted with knowledge of the prevailing case law. The lien acts in question were enacted after the decision of Wheaton v. Department of Public Aide, 92 Ill. App. 3d 1084 (2nd Dist. 1981), which dealt with the same fact pattern. For that reason, the Illinois Supreme Court reversed, allowing the lienholders under the Physician's Lien Act to recover up to one-third and then the lienholder under the Hospital Lien Act to recover up to one-third.

In a strong dissent, Justice Harrison pointed out that the dispute in this case increased the total for all three healthcare providers for all of \$82.53. Seemingly with tongue in cheek, Justice Harrison made the comment that:

What this shows to me is that there is no amount too trivial to warrant the court's intervention if my colleagues believe that they can make the litigation process more difficult for plaintiffs.

Justice Harrison pointed out in his dissent that under the majority's ruling in Burrell, a plaintiff could have his or her entire recovery wiped out in situations with multiple lienholders under competing lien acts with amounts exceeding the recovery. Prophetically, Justice Harrison stated that the majority's decision "sets the stage for inequities that the legislature could not have intended and failed to recognize when it debated and enacted the law."

The New Law

In an effort to correct the potential for litigants to have their recoveries taken by multiple lienholders, the Illinois Legislature passed the Healthcare Services Lien Act which became effective July 1, 2003. Under the new law, it repeals the following:

1. Hospital Lien Act 770 ILCS 35;
2. Physician's Lien Act 770 ILCS 80;
3. Emergency Medical Services Personnel Lien Act 770 ILCS 22;
4. Physical Therapist Lien Act 770 ILCS 75;
5. Home Health Agency Lien Act 770 ILC 25;
6. Dentists' Lien Act 770 ILCS 20;
7. Optometrist Lien Act 770 ILCS 72;
8. Clinical Psychologist's Lien Act 770 ILCS 10.

In addition, portions of the Attorneys' Lien Act (770 ILCS 5) are also repealed as discussed below.

It should be noted that the Healthcare Services Lien Act is effective for liens perfected on or after July 1, 2003. Thus, the "old" lien acts will still have applicability for some time on pending cases.

Further, the Healthcare Services Lien Act creates two categories. First, there are healthcare professionals (for example, doctors). Second, there are healthcare providers (for example, hospitals). The bottom line of the new lien act is that the total amount from both categories cannot

exceed 40% of the plaintiff's recovery. Further, no individual category can receive greater than 33% of the recovery. If the total liens are greater than 40% then the two categories each are capped at 20% of the plaintiff's recovery. If the total liens are greater than or equal to 40%, the total amount of attorneys' fees cannot exceed 30% of the plaintiff's recovery, thus guaranteeing some recovery to the plaintiff. The attorneys' fees section does not apply however if an appeal is taken by either party.

Caveats on the Act

It is important to note what the Healthcare Services Lien Act does not do. First, workers' compensation liens are not addressed as they fall under a separate act. Second, subrogation claims are not addressed and thus excluded from the percentage limitation. This will have impact in cases where, for example, there is med pay coverage or where group insurance has paid a large portion of the medical bills. Finally, nothing in the Act limits healthcare providers or professionals from pursuing collection of its reasonable charges for the services rendered to an injured. It would thus seem there remains a contractual right for the various lienholders to recover the remaining amount due.

Although liens are typically a plaintiff's attorney's headache, they can make or break a settlement as we all well know. It is important therefore to keep tally on each individual lien as well as to keep track of whether it has been properly perfected. In order to effectuate a lien, a healthcare professional or provider must serve written notice on the injured person and the party against whom the claim or right of action exists. Service must be by registered or certified mail or in person. In attempting to work out a settlement, if a lien can be reduced to zero by its not having been properly perfected, both sides benefit.

In addition, especially in cases where liens may be a stumbling block to settlement, Section 25 of the Act should be kept in mind by both the plaintiff's attorney and the defense attorney. Under Section 25, upon written request by medical authorizations signed by the patient or the patient's representative, or by subpoena, any party to a pending court action against whom a claim is asserted for damages resulting from injury shall be permitted to examine the records of any healthcare professional or healthcare provider concerning the healthcare professional's or healthcare provider's treatment, care, or maintenance to the injured person. Within twenty (20) days after receiving a written request by medical authorization signed by the patient or the patient's representative, or by subpoena, a healthcare professional or healthcare provider claiming the lien under this Act must furnish to the requesting party or file with the Clerk of the Court in which the action is pending all of the following:

1. A written statement of the nature and extent of the injuries sustained by the injured person.
2. A written statement of the nature and extent of the treatment, care or maintenance given to or furnished for the injured person by the healthcare professional or healthcare provider.
3. A written statement of the history if any as given by the injured person and so far as shown by the healthcare records, as to the manner in which their injuries were received. Most importantly, under the subsection (b) if "the healthcare professional or healthcare provider fails or refuses to give or file a written statement and conformity with and as required by subsection (a) after being so requested in writing in conformity with subsection (a), the lien of that healthcare professional or health provider under this act shall immediately become null and void." (*emphasis added*)

Thus, it would seem in every plaintiff attorney's interest to attempt to wipe out a lien in such a manner and defendant's attorneys may also do so through the process of subpoenaing medical records so long as they comply with subsection (a).

As a defense lawyer, it is important to keep in mind and track all healthcare liens impacting the potential settlement. The cap on lienholders covered under the new Act and the plaintiff's right to a portion of the settlement will aid in settlement discussions, and no longer be a reason to increase an offer.