Subrogation and Liens:
Basic Principles and Practical Considerations

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Texas Hospital Lien Statute

- Texas Property Code gives a hospital a lien on a claim, judgment or settlement of an injured party whose hospitalization is attributable to the negligence of another.
- For the lien to exist, the admission for the initial hospitalization must be within 72 hours of the accident.
- If the initial admission occurs within 72 hours of the accident, then the lien exists for all subsequent admissions as a result of injuries sustained in the accident.
A hospital must take action to perfect its lien. Before money is paid to the injured person, the hospital must file a notice of the lien with the county clerk of the county in which the hospital services were rendered.

Even when perfected, the amount of the hospital lien covers only the first 100 days of hospitalization.
Texas Hospital Lien Statute

- Statute creates a separate cause of action for the hospital independent of the patient’s obligation to pay for services rendered.
- FOUR (4) YEAR statute of limitations applies.
- Hospital may sue the defendant’s insurer, the plaintiff who received proceeds and the plaintiff’s attorney who received proceeds.
Lien does not apply to UM/UIM recovery because such recovery is not “public liability insurance” as defined in the statute.

Lien does not apply to a wrongful death recovery, although a survival cause of action may be subject to the lien.

If lien filed after money paid, lien does not attach to those proceeds.

Hospital cannot perfect a lien against the judgment or settlement of any claims if the injured person initially comes in for treatment 72 hours or more after the accident.
Texas Hospital Lien Statute

- In order to discharge a lien, the hospital must simply file with the county clerk’s office where the lien is on file a certificate stating that the debt covered by the lien has been paid or released and authorizing the clerk to discharge the lien.
- Good idea to obtain copy of release for file.
The Veterans Administration

- VA has a right of reimbursement for the value of any treatment provided whether in one of its facilities or under its direction.
- The made whole doctrine applies in VA claims.
What Must VA Do To Protect Subrogation Interest?

- Intervene or join in the action; or
- If action not instituted within 6 months after care is furnished or paid by the United States, by instituting and prosecuting own legal proceeding against the responsible party.
Workers’ Compensation insurers have a direct right to recovery for first monies collected by an injured employee from a liable “third party.”

- The term “third party” may include first party UM/UIM claims, but cannot include an employer.
Workers’ Compensation

- The third party and the employee are jointly and severally liable to the insurer for failing to pay the subrogation interest.
- The employee’s attorney can also be liable since he receives a portion of any recovery as his fee.
- A workers’ compensation insurer is able to enforce its subrogation interest without intervening in the employee’s case.
Personal Injury Protection (PIP)

- Under Texas Insurance Code 1952.155(b) there can be no subrogation for PIP payments.
- PIP carriers may claim payments as an offset under liability and UM/UIM coverage. However, if the UM/UIM coverage is inadequate, an offset may not be taken.
- PIP carrier may be required to list Medicare (or others with a valid subrogation interest against PIP claims) as a payee on the PIP payment.
UM/UIM carrier has a subrogation interest that the insured must not destroy.

Policy contains subrogation clause and instructs insured to take no action. However, UM/UIM carrier will have to show prejudice in order to avoid payment of UM/UIM benefits based on destruction of subrogation interest.
Courts are split:

- Generally, if the employee purchased the UM/UIM coverage, courts do not allow the workers’ compensation carrier to subrogate.
- If the employer purchased the UM/UIM benefits, at least one court has allowed the workers’ compensation carrier to subrogate.
Medicaid

- State administered federal program designed to provide medical care for the needy.
- In Texas, Medicaid administrator has a direct cause of action to collect unpaid benefits from personal insurance, a person whose wrong caused the injury and other resources.
- The Medicaid administrator can enforce the subrogation interest even without intervening in the injured person’s case.
- Medicaid has the authority to reduce its subrogation interest when the recipient is needy, or in consideration of attorneys fees.
Employee Retirement Income Security Act of 1974 (ERISA)

- ERISA: Federal law trumps state law (with some exceptions).
- Get a copy of the Summary Plan Description (SPD).
Medicare

- Health insurance program covering people who are 65 and over or who meet other special criteria.
- Under federal law, Medicare is subrogated to claimant's cause of action or right to recover under workers’ compensation, automobile or liability insurance or against self-insurers.
- Subrogation extends to recoveries obtained from the Plaintiff’s no-fault auto coverage (i.e., PIP and MedPay).
If one is aware or “should be aware” of the lien, then it is perfected—even when no notice of the lien is given.

42 C.F.R. § 411.21(1)(2).
2003 Medicare Secondary Payer Act (MSP) with 2006 Revisions

- Medicare is not a primary payer, it is a “secondary payer.”
- Medicare has right of reimbursement from Medicare beneficiary who receives a “primary plan payment” from a “primary plan.” 42 U.S.C. §1395.
Medicare

- If reimbursement is not made to Medicare, an action may be brought against any entity responsible for payment (this could include the beneficiary, plaintiff’s attorney, defendant’s attorney, and liability carriers).
- Indemnity language in settlement agreement will not protect settling party.
Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA)

- Providers of liability insurance determine the Medicare-entitlement of all claimants and report information to Secretary of Health and Human Services.
- $1,000.00 per day penalty for failure to comply with reporting requirements.
Medicare

- Medicare Set-Aside Arrangements
- Old law: Recovery of future medical care limited to workers’ compensation cases.
- Future medical care required: Establish MSA (interest-bearing account), with annual statement disbursed to Center for Medicare and Medicaid Services (CMS).
- Failure may result in denial of future Medicare benefits to plaintiff.