

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.

Texas Hospital Lien Statute

- 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.

Texas Hospital Lien Statute Exempted

- 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.

The Veterans Administration

- 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

- 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

- 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.

UM/UIM and Workers' Compensation Benefits

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).
- “All means all.” *Sunbeam-Oster, Inc. v. Whitehurst*, 103 F. 3rd 1368 (5th Circuit 1996).

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).

Medicare

- 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).

Medicare

- 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

- 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.