

Checklist and Helpful Tips for Dealing with Liens in Personal Injury Cases

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Most plaintiff's lawyers will agree that dealing with liens is the worst part of the job. You aren't taking a fee on the work you're doing to resolve outstanding liens; your clients don't understand why some other entity is trying to reduce their recovery; and it seems lien rights are shrouded in a cloud of mystery that no one truly understands. Plus, liens always seem to rear their ugly head at the worst possible time- right before you're ready to settle the case. The goal of this presentation is to give you some strategies and best practices that we have implemented to deal with these issues. The following pages cover these topics:

- I. Case Intake
- II. Clients Without Health Insurance
- III. Clients with Private Insurance
- IV. Clients with Government-Provided Benefits
- V. Other Liens

I. CASE INTAKE

While we usually think that liens are something we have to deal with at the conclusion of a case, the best strategy for effectively managing liens begins when you sign up the case. It is crucial that you're asking healthcare coverage questions at the initial client meeting. We cover the following items in our intake paperwork:

1. **Do you have health insurance?**
2. **What is the source of the healthcare coverage- i.e., self-pay, employer-provided, government-provided?**
3. **What company do you work for? How many people work there?**
4. **Are you a government employee?**
5. **Do you have online access to your health insurance account? If not, may we create an account for you?**
6. **Do you have a copy of the summary plan description for your health insurance plan? (some employees hang onto the documents initially given to them from their HR dept. when they started their job).**
7. **GET A COPY OF THE FRONT AND BACK OF THE HEALTH INSURANCE CARD. Send a letter with this information to all hospitals and request that your client's bill be processed through the applicable coverage.**

Having this information from the beginning of the case will provide you with valuable insight on what kinds of reimbursement claims may exist. I always explain to the client why this information is important- not only are we trying to maximize your recovery from the tortfeasor and his/her insurance company, but we are also trying to minimize the amount we have to pay back for your medical care.

II. CLIENTS WITHOUT HEALTH INSURANCE

In almost all cases in which your client is not covered by health insurance and they have sought post-accident treatment at a hospital, you're going to be dealing with a hospital lien, governed by O.C.G.A. § 44-14-470, *et. seq.*

1. **Ask your client if they've received notice in the mail of the hospital's intent to file a lien.** These days, most hospitals have hired outside companies such as RevClaims, Avectus, The Smith Group, etc. to handle the filing of hospital liens. They have become extremely proficient at identifying which patients have sought treatment as a result of an accident, particular if the reason for the visit is a car wreck.
2. **Try to get any other correspondence the client has received from the hospital-** this information may include the name and contact information for the third-party lien company if notice of the lien filing hasn't yet been received.
3. **Check the Superior Court Lien Index (<http://search.gsccca.org/Lien/lienindex.asp>) to verify if a lien has indeed been filed.**
4. **Read the contents of O.C.G.A. § 44-14-471 carefully-** a hospital must file a lien within 75 days after the patient has been discharged; a physician practice has 90 days to file a lien from the patient's first date of service with that particular practice.
5. **Contact the lien filer immediately if you know that there will be a liability dispute and/or if you know (or have an educated guess) that the available coverage is low compared to your client's damages-** they may be able to submit an emergency Medicaid application and process the bill accordingly.
6. **Hospital Lien Negotiation-** working with these third-party lien companies has become more difficult recently. In my experience, they will not begin to negotiate with you until

you are very close to settlement or the case has already been resolved. I am finding that many of these companies will not budge off the lien in certain circumstances.

- a. **If they won't negotiate, tell them the case has been settled and hold the money for the lien in trust-** pursuant to O.C.G.A. § 44-14-473, the statute of limitations on a hospital lien is one year from the date of settlement.
- b. **If your client is hurting for money, release some portion of the settlement proceeds to them at your discretion-** you can do this because your attorney's fee lien is superior to the hospital lien. Just be prepared to cut your fee in the end if you can't get a deal worked out with the hospital.

III. CLIENTS WITH PRIVATE HEALTH INSURANCE

1. Determine how the private insurance is being provided:

- a. If the insurance is purchased directly from the insurer by your client (such as through the healthcare exchange (ACA)), Georgia state law applies and there is no right of reimbursement unless the client has been “made whole.” O.C.G.A. § 33-24-56.1.
- b. If an employer is purchasing the insurance and an insurance company is paying the claims, state law applies as well (this is more common with smaller companies that cannot afford to pay the claims themselves). These plans are sometimes called “multiple employer plans” because multiple companies have joined together under a group insurance coverage plan.
- c. If an employer is purchasing the insurance and paying the claims for its employees, state law is exempted and you’re looking at having to deal with the reimbursement claim- the dreaded self-funded ERISA healthcare plan.

2. If you’re dealing with a suspected “self-funded” ERISA plan, consider the following:

- a. If neither your client nor your office has even been contacted by the health insurance plan or a third-party company acting on their behalf, we generally lay low and don’t notify the health care plan of the tort claim. HOWEVER, always be sure you pull the claims log from your client’s online account to verify what amounts have been paid by the plan just in case they ever surface demanding payment.

- b. If you have received notice of the plan's subrogation claim, you should reach out to the plan or its third-party agent and request a copy of the plan language, the summary plan description, the Form 5500, and a ledger of the payments made to date. You technically have to get these documents from the "plan administrator," but there is a \$110/day penalty if the documents are not provided within 30 days.

3. How do I tell if the plan is truly governed by ERISA?

- a. If they can't provide you the documents requested, it's probably not a plan governed by ERISA. Don't take their word for it!
- b. Look for language in the summary plan description that lays out the funding arrangement for the plan- remember, if the employer is not funding the plan and paying claims directly, the plan is not fully self-funded and state law would apply. The Form 5500 can also provide some guidance on the funding arrangement.
- c. Even if the funding arrangement checks out, make sure the plan disavows the "made whole doctrine"- it is possible for a plan to be fully self-funded but not have the proper language in it's plan to make it exempt from Georgia state law. The 11th Circuit rule is that the common law made-whole doctrine applies unless there is a clear and unambiguous rejection of the doctrine.

4. What do I do if the plan is governed by ERISA?

- a. Negotiate with them before you settle the case- you have greater leverage over them at that time.
- b. Other things to look for in the plan documents:
 - i. If the plan does not reject the "common fund" doctrine (i.e., the defense that the plan should have to reduce it's lien by a pro rate share of the

attorney's fees and expenses), argue that it should apply and negotiate for a reduction accordingly.

ii. The plan must also identify a specific fund from which it is seeking reimbursement- repayment out of a "recovery from a third party" is sufficient.

iii. If there is a conflict between the summary plan description and the plan language, the plan language controls.

c. If all else fails, you can still probably negotiate a 10-15% reduction simply because it would cost them a significant amount of money to sue you and your client over the balance of their lien.

d. The *Montanile* decision gives some teeth to the threat of releasing the funds to the client, but actually going through with that course of action is done at your own peril! That holding did not address whether an attorney can get sued directly for doing this.

5. A Note on Health Insurance and Hospital Liens- there is a growing trend of hospitals refusing the bill a client's health insurance plan and filing a hospital lien instead. We are dealing with this issue in multiple cases currently. Look for this issue in your cases, and ALWAYS send a letter after the intake meeting demanding that health insurance be billed.

IV. CLIENTS WITH GOVERNMENT-PROVIDED BENEFITS

1. Medicare

- a. Billing- hospitals view Medicare as a secondary payor, and it can be difficult to get them to process the bill accordingly. The only thing that motivates providers in this regard is the fear of missing out on more money (low coverage limits, disputed liability, etc.). Providers cannot bill Medicare until 180 days has passed. Furthermore, if the case settles within 180 days and Medicare is aware of the settlement, they can refuse to accept the bill.
- b. Reimbursement- Medicare will reduce its lien a pro rata share for attorney's fees and expenses. When dealing with Medicare, you need to contact them a few months prior to settling the case to obtain the "conditional payment letter" showing the amount of their lien- don't rely on what the representative says over the phone or what you can obtain through the client portal. Communications with them are often delayed, so early contact is the best practice.

2. Medicaid

- a. Billing- just like with Medicare, you cannot force a provider to bill Medicaid. If you run into a difficult case with high bills and low coverage, you can contact the provider and encourage them to submit an emergency Medicaid application. Also, low income residents of Fulton and DeKalb are eligible for Grady's financial assistance program.
- b. Reimbursement- unlike Medicare, Medicaid will not reduce its lien for attorney's fees and expenses. The reimbursement formula is based on case value: if you have a case that's worth \$100K, but the policy limit is only \$50K, Medicaid takes

a pro rata reduction based on the recovery; so, in this instance, they would reduce their lien by 50%. Another point to note is that the *Ahlborn* decision was reinstated as of 2018- this decision stands for the proposition that Medicaid's reimbursement claim is limited ONLY to the portion of the judgment or settlement attributable to medical costs.

3. **State of Georgia Employee Healthcare-** there is almost never a right to reimbursement under these plans because any such plan is subject to the protections of O.C.G.A. § 33-24-56.1. There is only a right of reimbursement if the plan can show that the client was fully compensated by their share of the proceeds after accounting for all of the liens (subtracting the liens from the client's recovery); this could never really be proven unless there was a large punitive damages award.
4. **Federal Employee Benefits-** the made whole statute does NOT apply to these plans, but the common fund doctrine does apply. Therefore, you can typically get these liens reduced by around 50% (taking into account attorney's fees and expenses).

V. OTHER LIENS AND SPECIAL CIRCUMSTANCES

1. **Worker's Comp Liens-** these liens have incredibly weak reimbursement rights in Georgia because they are subject to the "made whole" doctrine. Unless they can show that your client has been fully compensated, their reimbursement claim has no merit. Keep in mind that there is no pain and suffering in worker's comp. Finally, if you know the worker's comp attorney, encourage them to get the carrier to waive subrogation as a condition to any worker's comp settlement.
2. **Child Support Liens-** your attorney's fee lien is superior to these liens under O.C.G.A. § 15-19-14, but it's still helpful to know about. Yet another reason to check the lien index before disbursing settlement funds.
3. **Tax Liens-** these liens are primary to your attorney's fee lien. If you become aware that your client is dealing with a tax lien, contact a competent tax attorney immediately.
4. **Large Medical Liens-** if you're dealing with an especially large lien for medical expenses paid (\$100K+), it is usually going to be in your client's best interests to get a subject matter expert involved to deal with that situation, especially if they are claiming to be governed by ERISA.

Ethical Issues in Personal Injury Cases

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Telephone Call #1

I was badly injured in an accident with a Fedex truck. I already have a lawyer but he is doing a terrible job, and I want to fire him.

2

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Telephone Call #2

I was badly injured in an accident with a Coca-Cola truck. My wife and I are looking for an attorney.

3

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Telephone Call #3

I was badly injured in an accident. I was driving and my brother was in the passenger seat. He was hurt also. We are looking for an attorney.

4

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Telephone Call #4

Myself and my two brothers were sitting at a light and were suddenly rear-ended by a BMW. We were all hurt. We are looking for an attorney.

5

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Telephone Call #5

My child was killed in an auto accident. My husband was driving the car. We need an attorney.

6

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Telephone Call #6

My child was killed in an auto accident. I am divorced but my ex-husband, and I want to use the same lawyer. Can you help us?

7

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Scenario #8

My client has been offered \$50,000 to settle his case but refuses to settle. His case is worth less than \$50,000. He says I am his lawyer, and I have to take his case to trial.

8

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Scenario #9

I received a call from someone who was injured in an accident but it involves an area of law that I am not experienced in. Can I share fees with another lawyer on this case?

9

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Scenario #10

I have settled a case for a client, and I am about to disburse the money to the client, does the client have to sign anything?

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