

Ethical Issues Surrounding Trusts, Liens and Collateral Sources

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1. Introduction

Consumer attorneys in personal injury matters frequently encounter lien and reimbursement issues which may present a quandary in terms of honoring the lien/reimbursement claim especially when the client may dispute payment thereof. This article addresses some of the unique ethical issues and obligations involving liens/trusts and collateral sources.

2. Contractual vs. Statutory Liens

There are two basic types of liens, statutory and contractual.

a. Statutory Liens

i. Medi-Cal/Medicare

These are considered “super liens.” The attorney must ascertain if Medi-Cal or Medicare has paid some of the medical expenses related to the personal injury claim. Concerning Medi-Cal the reimbursement right is contained in Welfare & Institutions Code sections 14124.71-14124.79. The attorney and insurance company are obligated to report to the Director of the California Department of Health Services the fact that a lawsuit has been filed within 30 days of said filing. See Welf. & Inst. Code § 14124.73. There is no Medi-Cal lien on wrongful death recovery because a wrongful death claim does not include compensation for the victim’s medical expenses. *Fitch v. Select Products Co.* (2005) 36 Cal. 4th 812, 819, 31 Cal. Rptr 3d 591, 595. A Medi-Cal lien should be resolved prior to a minors compromise application and the court must be apprised of the same. Medi-Cal liens can typically be resolved within 30 to 60 days through the Department of Health Services.

Medicare does not have a provision similar to Medi-Cal concerning notification of a lawsuit. However, Medicare has a right of action to seek personal reimbursement from the attorney. See 42 USC section 1395Y (b) (2)(B), *Zinman v. Shalala* (ND CA 1993)835 F. Supp. 1163, 1166-1168. Unfortunately, it can take a substantial amount of time to get a Medicare lien resolved (6 to 12 months.) What does plaintiff's attorney do in a situation where a case is settled and the insurance carrier insists on putting Medicare's name on the check? It is suggested that the attorney offer that attorney and client sign a hold harmless agreement holding the insurance carrier harmless from any claim of Medicare. Where the carrier agrees to this method, the attorney should hold out a safe amount from the settlement based upon the medical bills paid by Medicare and once the lien is resolved, the attorney will provide the client with the remaining funds. The attorney can face discipline for failure to honor Medi-cal and Medicare liens. *Matter of Riley* (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 110-112. In *Matter of Riley*, the attorney failed to honor a Medi-Cal lien and was suspended from practice for a period of time.

ii. Workers Compensation Liens

The attorney must give notice of filing a lawsuit against the third party to the employer that has paid workers compensation benefits "forthwith" via personal service or certified mail. Labor Code section 3853. An ethical issue may arise when the attorney settles a third party claim involving a workers compensation lien as to whether the attorney can charge her fee on the total recovery or just on the recovery amount after payment of the workers compensation lien. If a complaint-in-intervention or separate lawsuit has been filed by the employer, then the attorney should only charge a fee on the amount recovered less payment to the workers compensation carrier. If however, the workers compensation carrier did not file suit, then the attorney may ethically charge a fee on the whole recovery. Labor Code sections 3856, 3860, *Quinn v. State of California* (1975) 15 Cal. 3d 162, 166-169, 124 Cal.Rptr. 1.

iii. Hospital Liens

Hospital liens are governed by California Civil Code sections 3040 through 3045.4. For a hospital lien to be valid against the recovery in a personal injury matter, proper written notice must

be given pursuant to California Civil Code section 3045.3. The amount which the hospital may recover from the settlement is governed by California Civil Code section 3040. The maximum recovery is no more than a half of the settlement and there must be a reduction for attorneys fees and costs. If the hospital did not give proper notice pursuant to Civil Code section 3045.3, that simply relieves the attorney of the obligation to pay the hospital however it is not good practice to avoid paying the hospital out of the settlement simply because the certified letter has not been sent. The patient has typically signed an agreement at the emergency room obligating payment. Therefore, the attorney should make every effort to resolve these liens. Similarly, pursuant to Civil Code section 3040 where the hospital is only entitled to 50% of the settlement money, the client is still obligated to pay for the remainder of the hospital bill unless an agreement is reached that 50% payment from the settlement is full satisfaction of the lien.

The issue of balance billing arises where the client obtains emergency medical care and the health insurance carrier pays a portion of the bill and the hospital or surgeon attempts to bill the patient for the balance. The hospital/surgeon may not balance bill beyond the agreed upon contract rate with the health insurer. See *Parnell v. Adventist Health System/West* (2005) 35, Cal. 4th 595, 26, Cal Rptr. 3d 569. Balance billing is not just prohibited where there is an established contract rate, but where the patient's health insurer did not have a contractual relationship with the emergency medical provider and pays a portion of the bill. *Prospect Medical Group, Inc. v. Northridge Emergency Group* (2009) 45 Cal. 4th 497, 87 Cal.Rptr. 299.

The attorney should keep the client apprised of all developments concerning liens, and the client's obligation to satisfy the lien. Rule of Professional Conduct 3-500 provides:

“A member shall keep a client reasonably informed about significant developments relating to the employment or representation....”

b. Contractual Liens

Contractual liens arise out of a contract between the client and/or attorney and provider or insurance carrier.

i. Medical Providers

Where an attorney has signed a medical lien, the attorney is obligated to honor that lien or face discipline. *Matter of Riley* (1994) 3 Cal. State Bar Ct. Rptr. 91, 113-114. It is important that the attorney carefully read all liens presented before signing same. What happens when a medical lien is signed by the client and not the attorney and the client instructs the attorney not to pay the lien? Under this situation, the attorney should encourage the client to resolve the lien, however, if the attorney has not signed a lien the attorney should provide the funds to the client and have the client sign off that they have instructed the attorney not to pay the medical provider and the client understands it is the client's obligation to pay the medical provider.

If an attorney and client both sign a medical lien and the client demands that the attorney not pay the medical provider out of the recovery, the attorney must either resolve the lien with consent of the parties or file an interpleader action. *Matter of Respondent P.* (1993) 2 Ca. State Bar Ct. Rptr, 622, 632.

In situations where the client's medical pay carrier claims a reimbursement right, the attorney is not obligated to act as bill collector for the carrier on their reimbursement claim. *Farmers Insurance Exchange v. Smith* (1999) 71 Cal app fourth 660, 664, 83 Cal Rptr 2d 911. However, the best practice is to resolve the matter on the client's behalf. The attorney should seek either a complete waiver under the "made whole" rule or seek one third off for attorneys fees under the common fund doctrine. The "made whole" rule applies to medpay reimbursement claims. *Progressive West Ins. Co. v. Preciado* (2005) 135 Cal.App.4th 263, 37 Cal.Rptr. 434. Recently, certain carriers including Geico and 21st Century have been claiming that they are entitled to 100% medpay reimbursement and do not have to honor the "common fund" doctrine pursuant to the case of *21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511. If this issue is encountered, provide the following argument, stick to your guns and these carriers will honor a one third reduction in reimbursement:

"You have refused to reduce 21st Century's medpay reimbursement claim by one-third under the "common fund" rule, stating that *21st Century Ins. Co. v. Superior Court* held that the common fund rule no longer applies. This position is

clearly a bad faith tactic. The *21st Century* case does not say what you claim. What happened in that case was the Plaintiff tried to claim an offset on the total amount of the plaintiff's attorney's fees before having to consider reimbursing 21st Century under the common fund theory. The *21st Century* court stated that the common fund rule is the same as it always was, 'that 21st Century has properly discharged its obligation to pay its pro rata share of attorney fees'...'contributing \$400 to Quintana's attorneys fees.' Hence, under the common fund theory, a medpay carrier still has to pay the percent that the plaintiff has paid for purposes of reimbursement. *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1297, 1284, 22 Cal.Rptr.2d 20.

ii. Health Insurance Liens

Health insurance obtained directly by plaintiff or her employer typically has a provision requiring reimbursement for sums paid to health-care providers as a result of an accident. It is critical to obtain a copy of the health insurance contract to ascertain the reimbursement rights of the health insurance carrier. In cases where the plaintiff is not "made whole," a letter should be sent outlining that the client is not made whole after payment for medical expenses, lost wages, costs and attorneys fees. *Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4th 533, *Barnes v. Independent Auto. Dealers of California* (9th Cir. 1995) 64 F.3d 1389. Even in cases where the health insurance carrier has contracted around the "made whole" rule and "common fund" doctrine, where equity so dictates, counsel should still make a "made whole" and "common fund" argument.

Kaiser liens are typically "third-party" liens and therefore there is no right to uninsured or under-insured motorist recovery. Some health insurance carriers, for instance, the Screen Actors Guild Health Plans, will demand the member and attorney sign a lien in order to continue paying the health-care providers. In situations where this occurs, counsel should write the following language onto the lien:

"By signing this lien no rights are extended to the lienholder beyond those rights contained within the subject contract between the insurer and member."

Attorneys should confirm in writing with the client their health insurance lien obligations and this requirement is consistent with Rule of Professional Conduct 3-500, “a member shall keep a client reasonably informed about significant developments relating to the employment or representation....”

3. Collateral Sources

The amount a plaintiff is entitled to recover for medical expenses, the gross amount billed vs. the amount health insurance has accepted as full payment, is currently before the California Supreme Court. *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal. App. 4th 686, review granted March 10, 2010, No. S179115–Reply Briefs due July 27, 2010. Counsel is therefore presented with an ethical dilemma concerning how far to push this issue without clarity in the law.

a. Hanif v. Housing Authority

In the case of *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 246 Cal.Rptr. 192 the plaintiff offered into evidence the amount paid by Medi-Cal and still wanted to recover the full amount of the billed charges. The *Hanif* trial court awarded plaintiff the reasonable value of medical services including the amount written off. The Appellate court ruled that plaintiff was overcompensated:

“ [a] plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable.”

Id. at 643.

Post *Hanif* and before *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 112 Cal.Rptr.2d 861, plaintiffs had been able to confine the *Hanif* rule of limiting plaintiff’s recovery to the “actual amount expended or incurred for past medical services” to cases involving Medi-Cal. The rationale of this limitation is that Medi-Cal involves a situation in which the plaintiff did not pay for years of insurance premiums which accounted for the reduced medical charges (the foundation of the collateral source rule.)

b. Nishihama v. City and County of San Francisco

In 2001, the First District Court of Appeal, in *Nishihama, supra* extended Hanif's rule of limiting plaintiff's medical specials beyond Medi-Cal to include *private health insurance* reductions. In a follow up to *Nishihama*, the case of *Greer v. Buzgheia* (2006) 141 Cal. App. 4th 1150, 1156-1157, 46 Cal.Rptr. 780, held that evidence of the full amount of plaintiff's billed medical expenses were to be presented to the jury and upon proper post-verdict motion, an offset may be sought.

c. The Collateral Source Rule

As stated by our California Supreme Court in *Lund v. San Joaquin Railroad* (2003) 31 Cal.4th 1, 10:

“California has adopted the collateral source rule. (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 729 [94 Cal. Rptr. 623, 484 P.2d 599] (*Hrnjak*); *Helfend v. Southern Cal. Rapid Transit Dist., supra*, 2 Cal.3d 1, 6, 84 Cal.Rptr. 184; but see Civ. Code, § 3333.1, partially abrogating the rule in actions against a health care provider based on professional negligence.) As we have explained: The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.... If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.”

d. *Howell v. Hamilton Meats & Provisions, Inc.* (2009)

The disparity in law is presently being decided by the California Supreme Court in *Howell, supra*. Even though the appellate court decision in *Howell* may not be cited as authority, it is must reading for anyone dealing with this issue. *Howell* does not attempt to make new law, but simply cites to the California Supreme Court in *Helfand, Supra* and confirms the vitality of the Collateral

Source rule and distinguishes *Nishihama* as a hospital lien act case which does not confront the well established Collateral Source rule.

e. *Yanez v. Soma Environmental Engineering, Inc. (2010)*

The recent case of *Yanez v. Soma Environmental Engineering, Inc* (June 2010) First District A123893, holds that the Collateral Source rule prohibits a *Hanif* offset in the private health insurance context. In *Yanez*, the trial court, post-verdict reduced the amount of the medical specials awarded by the jury from the gross amount of \$44,519.01 to the amount accepted as payment in full via the health insurance contract rate of \$18,368.24. The appellate court reversed the trial court holding:

“The collateral source rule is based on Supreme Court authority. If modifications to that rule are called for as a matter of fairness and good policy, only our Legislature or Supreme Court may make them. ¶ We believe the alternative that has developed in the trial and appellate courts of this state – holding post verdict *Hanif* hearings in which the trial court hears evidence of the discounted amounts paid by private insurers and reduces the jury’s verdict — lacks a sound foundation as a matter of law or policy.” *Id.* at 20.

The *Yanez* court explained the basis of its ruling:

“In our view, the trial court erred in reducing Yanez’s damages to the amount actually paid by her insurers. Although the court reasonably relied on case law extending *Hanif* to the private insurance context, we find *Hanif* used overly broad language and the extension of its holding to private insurance by *Nishihama* and other cases is inconsistent with the collateral source rule. Consistent with the view taken by the appellate courts in a great majority of the jurisdictions that have considered the issue, we conclude the amounts written off by Yanez’s health-care providers constitute collateral source benefits of her insurance.” *Id.* at 14.

4. Conclusion

The mantra of plaintiff's counsel should be "resolve the lien." There is nothing worse than having a client come back to the attorney years after a case has resolved with "I didn't know about that lien" or "I didn't know it was my responsibility to pay that lien, I don't have the money now to resolve it." Attorneys have been suspended from the practice of law for failing to honor liens. Resolve the lien and confirm the lien related issues with the client in writing.