The FindLaw Guide to Negotiating Liens in Personal Injury Cases

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For many attorneys representing personal injury plaintiffs, dealing with liens, claims for reimbursement, and unpaid medical providers is a massive headache that is taking over their practice. This guide will provide a roadmap for negotiating liens and highlight some of the pitfalls for the unwary. Please note that we refer to all liens, claims for reimbursement, and unpaid bills as "lien claims," but remember that not all liens claims are created equal, nor do they all have the legal effect of a valid lien.

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Introduction

Clients often do not understand why they have to pay anyone back since the defendant was the one at fault in causing their personal injury. Clients can also be particularly perplexed by the idea of repaying their own health insurance plan, when they have spent years paying premiums.

> "Often, the work negotiating lien claims is more complicated than settling the underlying claim itself."

Often, the work negotiating lien claims is more complicated than settling the underlying claim itself. Attorneys also generally do not receive additional payment beyond the contingent fee from the third party settlement for the work they perform in settling liens claims, other than the eternal gratitude of their appreciative clients, which may or may not go far to pay their overhead.

Given the amount of work involved, and the corresponding lack of additional compensation, many attorneys say that they are fine with disbursing settlement funds to the client and instructing them to pay the liens and debts arising out of their personal injury case. Not only is this approach not a good idea from an ethical and legal standpoint, you will also have very unhappy clients, who will be dealing with the collection efforts of these various entities.

Done correctly, lien claims do not have to be an insurmountable endeavor. Moreover, as the attorney, you have significant leverage in dealing with lien claims, if they are dealt with prior to finalizing the third party settlement. Your client will not have this leverage over lien claimants if left to deal on their own after the settlement.

How to Approach Lien Claims

> Attorneys have ethical and fiduciary obligations to repay lien claimants.

Having a plan and a roadmap for dealing with lien claims is key. You do not want to be figuring out the entire body of law governing lien claims after you have received a settlement check for your client.

Start with these steps:

- Attorneys have ethical and fiduciary obligations to repay lien claimants.
- Understand what types of liens claims exist and what law and/or contract principles govern each type of lien claim:
    - Statutory: Medicare, Veterans Administration, Hospital, Medicaid, Workers Compensation, or ERISA health insurance plans (and some of these will also be governed by contracts)
    - Contractual: Medical pay under auto insurance, health insurance, ERISA, individual medical providers such as doctors, x-ray service providers, ambulance, chiropractor, acupuncture, or prior attorney
- Assess what lien claims are involved at the outset of the case.
- Explain to your client their obligation to pay lien claims.
- Call and write letters to each lien claimant at the beginning of the case.
- Keep the lien claimant in the loop as the case progresses.
- Contact the lien claimant to negotiate their claim BEFORE finalizing the third party settlement.

You can find an in depth discussion of each of these steps here.

Negotiating Lien Claims

> You have followed the above steps, so now what?

You have followed the above steps, so now what? Once you have established what the lien claims are, and who is asserting them, follow these steps for negotiating the lien claims.

1. **Read the Contract**
   Obtain a copy of the contract language and read it carefully. This is critical, as the contract language will determine what type of law governs the lien claim and what rights the lien claimant may have. You may have an ERISA, health insurance, med pay, or individual provider lien claim, to name a few, and each will be very different. If the lien claim is statutory, such as Medicare, Medicaid, or hospital, make sure you have all paperwork related to the claim, and understand the statutory scheme applicable to the lien claim.

2. **Narrow the Claim**
   When you read the contract or statutory language, determine the parameters of the lien claim. First, make sure they have a right to the claim that they are making. Second, know what settlement funds the lien claimant can go after. Most contract language limits recovery to 3rd party cases, and insurers do not have a right to settlement funds from Uninsured Motorist cases or Underinsured Motorist cases (1st party claims). However, note that some lien claimants include recovery from all sources, so be sure to check what they are entitled to under the contract or relevant statute.

Additionally, the contract language will reveal whether the lien claimant can assert, or has contracted around certain defenses, such as the "made-whole" or common fund doctrines. These points are discussed below in more detail, but it's important to be aware, at the outset, whether these arguments are going to be available to you.

If the make whole or common fund doctrines are not available, it may be more of an uphill climb getting the claims settled.

In the context of hospital lien claims, make sure the hospital is not attempting to balance bill your client. Balance billing occurs when a hospital charges your client for the difference between the hospital's charged rate and the amount your client's health insurer paid to the hospital as its contract rate. When this is or is not permitted involves a lengthy discussion that you can find here.

3. **Reduce for Unrelated and Unreasonable Charges and Obtain Credit for Co-pays**
Review the itemization of charges for any unrelated charges or double billing, and have these charges removed. Also, review the charges to make sure that the charges are reasonable. This may be difficult, considering that most charges on any medical bills seem exorbitant these days. However, after reviewing a slew of medical bills, you will start to get a feel for the pricing of certain services in the geographical area that you practice. When it comes time to negotiate, raise the issue of reasonableness, and if the defendant in your case is also raising the issue, advise of that as well.

One case in California has held that the burden is on the hospital to demonstrate the reasonableness of their charges to recover on their lien. This was in the context of hospital liens under California's Hospital Lien Act, but it makes sense that the lien claimant would have the burden of showing that claimed amounts are reasonable.

Importantly, be sure to obtain a credit for any co-pays made by your client. These should be deducted from the total lien claim.

4. **Reduce for Actual Recovery of Medical Bills**
It may seem obvious, but if certain medical bills are not part of the settlement offer, argue that they should not be included in the lien claim.

Additionally, if you have a case where the policy limits are smaller than the value of your case, and the amount of wage loss exceeds or makes up a large portion of the policy limits, or the limits are so small that the amount is less than the value for pain and suffering, make the argument that some, if not all, of the medical bills have not been recovered, and therefore the lien claimant cannot seek reimbursement for the same.

For a related discussion on this topic in the context of Medicaid liens, see State Medicaid Liens Limited By U.S. Supreme Court in Wos v. E.M.A.

5. **Reduce to the Statutory Cap**
If there is a statutory scheme for reducing the lien claim, follow the language of the statute. For example, in California, under Cal. Civil Code section 3040, liens can be no more than the cost to perfect the lien and the amount actually paid for non-capitated charges, and 80% for capitated charges (i.e. Kaiser, a system in which a medical provider is given a set fee per patient). Note that if you have a provider like Kaiser who pays the ambulance bill, and also has charges for services at a Kaiser facility, the ambulance bill will not be subject to the 80% reduction, but the Kaiser charges will be.

Next, there may be a statutory ceiling on the lien claim. In California, Cal. Civil Code section 3040(c)(2) provides that if the insured (your client) retains an attorney, the lien claim cannot exceed "one-third of the moneys due to the enrollee or insured under any final judgment, compromise, or settlement agreement." This statement

may be read to refer to the amount DUE the insured, after reductions for costs and attorney's fees (i.e. take one-third of the net to the client, not one-third of the gross settlement).

This position is often met with resistance from lien claimants, who take the position that they are entitled to one-third of the gross settlement. See, Gilman v. Dalby (2009) 176 Cal.App.4th 606, 620 ("as a matter of law, the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney lien for fees and costs before it is used to satisfy medical liens.") This may be a point of contention in your negotiations, but is one that is well worth making.

It will also be a point of contention, whether or not a statutory scheme applicable to health insurance lien claims will apply to ERISA claims.

Note that hospital and Medicaid also generally have statutory schemes that will reduce lien claims. For example, in Cal. Civ. Code 3045.4, a hospital lien is limited to 50% of the amount due your client after paying any prior liens. As stated above, take out attorney fees and costs first (and any other possible prior liens), and then the cap on the hospital lien should be 50% of the net remaining. However, if you have a county hospital lien, they will likely demand the full amount without reduction because they have a first priority lien, and they do not have to reduce for common fund.

6. **Reduce for Proportionate Share of the Statutory Cap Where Appropriate**

If you have multiple lien claims, particularly when you have a limited 3rd party policy from which to recover funds, it can be more beneficial to figure out a proportionate share of the statutory cap for each lien claim.

Many of us entered the legal profession to avoid math, but the best way to illustrate this concept is by example:

Say you have a proposed settlement for policy limits of $15,000.00. Your attorney fees are one-third, or $5,000.00. To keep it simple, let's say that the costs for the case are $500.00. Your client would due $9,500.00. I would take the position that the health insurer's claim can be no more than one-third of that figure, that is, $3,166.67.

In this hypothetical, say the health insurer with whom you are negotiating has a claim of $5,000.00, and the total lien claims are $10,000.00.

Therefore, the analysis of the health insurer's lien claim would be:

GROSS RECOVERY:	$ 15,000.00
Less: Attorney Fees & Costs of Recovery	$ 5,500.00
NET RECOVERY	$ 9,500.00
Amount Subject to Liens (1/3 x $9,500.00) =	$3,166.67

AMOUNT PAYABLE TO YOU IN SATISFACTION OF YOUR PROPORTIONATE SHARE OF ALL CLAIMS
(50% ($5,000.00/$10,000.00) x amount subject to liens $3,166.67 = $1,583.33

As you can see, we figured out what proportion the health insurer's lien claim is to the total lien claims. In this example, it is 50% ($5,000.00 claim divided by the total claims of $10,000.00). Next, you use that 50% number and multiply it by the amount available under the cap. Here, that is $3,166.67.

So, 50% of $3,166.67 brings us to the $1,583.33 amount to offer to the health insurer as their proportionate share, before taking into account any applicable further reductions discussed below. Right there, you have reduced their lien claim by 68.3%.

7. **Reduce for Comparative Fault**

If the settlement was reduced because the plaintiff was at fault for a percentage of their damages, use this to negotiate the lien down.

In California, Cal. Civil Code section 3040(e) provides for a reduction for the percentage of comparative fault on the part of your client, if certain conditions are met:

"Where a final judgment includes a special finding by a judge, jury, or arbitrator, that the enrollee or insured was partially at fault, the lien subject to subdivision (a) or (b) shall be reduced by the same comparative fault percentage by which the enrollee or insured's recovery was reduced."

This can also be used simply as a negotiating tool, even if you do not have a finding by a judge, jury or arbitrator. However, it will be useless if you try after finalizing a settlement. You must use this tool before you finalize the third party settlement.

If the lien claimant pushes back on this, you can ask the third party's adjuster or counsel to put in writing that their settlement offer reflects the percentage of fault assigned to your client. The Ahlborn case, supra, 126 S. Ct. 1752 (2006) is also helpful in making this argument. There, the court reduced the lien claim to one-sixth of the amount because the recovery by the plaintiff in that case was only one-sixth of the value of the case due to plaintiff's comparative fault, as evidenced by the stipulation of the parties.

8. **Reduce for Made Whole**
The made whole rule states that a lien claimant cannot assert its contractual right to repayment until the insured is fully compensated. Treatment of the rule may vary by jurisdiction.

In the case where the defendant has a limited policy, such that your client will not be made whole by the settlement, make the argument to the lien claimant that the settlement does not fully compensate your client for their injuries or damages.

There are some policies that specifically waive any rights to argue the make whole doctrine. Even if a policy includes this language, many insurers will consider the equities of the situation, so make the argument regardless of whether it is allowed by the policy or not.

9. **Reduce for Common Fund**
Finally, the common fund doctrine allows for reduction for attorney's fees and pro rata share of costs. "[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." US Airways v. McCutchen (2013) 133 S. Ct. 1537, 1545 citing Boeing Co. v. Van Gemert (1980) 100 S.Ct. 745. Under this doctrine, the lien claims must be reduced by the same percentage for attorney fees as the client is being charged as well as the proportionate share of the costs incurred by your client. US Airways also held that the common fund rule serves as the default if the contract is silent on the issue.

In California, this reduction is reflected in California Civ. Code section 3040(f) which states: A lien subject to subdivision (a) or (b) is subject to pro rata reduction, commensurate with the enrollee's or insured's reasonable attorney's fees and costs, in accordance with the common fund doctrine.

10. **Equitable Defenses and ERISA**
On April 16, 2013, the U.S. Supreme Court resolved a split among the Circuit Courts of Appeals on the applicability of equitable defenses (such as comparative fault, make whole, common fund) to self-funded ERISA plans, where the plan purports to waive said defenses. The Fifth, Seventh, Eighth and Eleventh Circuits, had held that the language of the plan governed. However, the Third and Ninth Circuits had found that that claims for "appropriate equitable relief" under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 are subject to traditional equitable defenses regardless of plan language to the contrary. See, U.S. Airways, Inc. v. McCutchen, 663 F. 3d 671 (3rd Cir. 2011) and CGI Technologies and Solutions v. Rose 683 F.3d 1113 (9th Cir. 2012).

The U.S. Supreme Court took up this issue in U.S. Airways, Inc. v. McCutchen, 569 U. S. ____ (2013), and held that in a section 502(a)(3) action based on an equitable lien by agreement, the ERISA plan's terms govern. Neither general unjust enrichment principles nor specific doctrines reflecting those principles can override the applicable contract.

Importantly, the Court did not stop there. Writing for the majority, Justice Kagan found that although "equitable rules cannot trump a reimbursement provision, they may aid in properly construing it. US Airways' plan is silent on the allocation of attorney's fees, and the common-fund doctrine provides the appropriate default rule to fill that gap.

Justice Kagan explained that the plan's terms fail to select between two alternatives: "whether the recovery to which US Airways has first claim is every cent the third party paid or, instead, the money the beneficiary took away." And in failing to so specify, the common-fund rule is the default rule.

"This Court has 'recognized consistently' that someone 'who recovers a common fund for the benefit of persons other than him self' is due 'a reasonable attorney's fee from the fund as whole.'"

Thus, although U.S. Airways' plan asserted a first claim on the recovery, its formula applies to only the true recovery, after the costs of obtaining it are deducted.

This holding, which provides something for both ERISA plans and tort plaintiffs, will no doubt greatly affect how ERISA insurers draft the language of their plans in the future. For a further discussion on ERISA liens, read here.

Know When You Are In Over Your Head

> "Know when to bring in an attorney specialized in this area, and do so before it is too late."

This is an extremely complicated area of law, and the consequences for improperly handling any lien claim are steep. Your client could end up with little and possibly nothing if the lien claim does not have to be reduced and there are not sufficient funds to go around.

There are many practitioners who focus solely in this area of law, and are well versed in the intricacies that it involves. Know when to bring in an attorney specialized in this area, and do so before it is too late.

Common Sense and Courtesy Should Prevail

A little knowledge and a lot of common sense and courtesy go a long way in this area of law. Innovative legal theories and arguments can take you part of the way, but often the best results in lien negotiations come because of rapport with the lien claimant and an appeal to their common sense. Generally, people recognize that getting paid something now is much better than risking it all and ending up with nothing.

Conclusion

Dealing with lien claims can be a daunting task to the unwary, but it is an integral part of personal injury claims that should not be an afterthought. If approached from the beginning of the case, and by using these steps and the negotiating tips that will follow in this series, you too can conquer liens.

Keep in mind this is a very high-level summary of lien claims. There are many pitfalls and nuances. For a further in-depth discussion of these issues, please see:

- 7 Steps to Approaching Lien Claims in Personal Injury Cases
- Negotiating Tips for Hospital Liens in Personal Injury Cases
- How to Deal with Medicare Liens in Personal Injury Cases
- Negotiating Tips for Med Pay Claims for Reimbursement
- Tips for Negotiating ERISA Liens in Personal Injury Cases
- Negotiating Tips for Health Insurance Liens in Personal Injury Cases

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