LIEN ON ME

Understanding the Illinois Health Care Services Lien Act & Maximizing Recoveries for Providers

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Objectives

• Gain an understanding of how the Lien Act works with respect to patient accounts.

• Learn ways to maximize your recoveries by utilizing the Lien Act and other tools.

• Learn how to formulate a global game plan for handling of potential “liability” accounts to maximize opportunity for recoveries across the board.
Health Care Services Lien Act

"When my parents don't want me to know what they're talking about they speak in Legalese."
Disclaimer

• The information provided in these materials and during this webinar is for informational purposes only, and does not constitute legal advice. The information contained herein is not offered as and does not constitute legal advice or legal opinions. You should not act or rely on any information contained in these materials or this webinar without first seeking the advice of an attorney.
The Lien Act – What is it?

• Statutory Cite – 770 ILCS 23

• It is a statute that prescribes how a health care provider or health care professional may recover a portion of a patient’s personal injury recovery as payment toward the patient’s medical bills, and it sets forth how much that health care provider or health care professional may recover.
The Lien Act – What is it? (cont.)

- An under-utilized and misunderstood tool that should occupy a prominent place in your revenue cycle strategy
- 20% of all injury-related emergency department visits are from motor vehicle accidents
- Improperly used as “reactive” strategy rather than “pro-active” strategy
Purpose Behind the Lien Act

- To lessen the financial burden faced by lienholders in treating nonpaying accident victims.
- To allow a lienholder to assist patients “without regard to ability to pay…”
- To allow the lienholder to “enter into a creditor-debtor relationship without the benefit of the opportunity usually afforded a creditor to ascertain the prospective debtor’s ability to pay.”
- See *In Re Cooper.*
Identifying the Accounts

• Admissions:
  • Noting that admission was result of accident
  • Location of accident
  • Date of accident
  • What happened (ie. 1-car accident; slip & fall)?

• Trauma codes
• Ease of ER Report Access
• Review
Gathering Information

- Internal Sources –
  - Medical records
  - Communications with patient
  - Admissions information
- Accident Reports (Attorney request, FOIA request)
- Insurance Companies (claim #, other insurers)
- Patient’s Attorney
How the Lien Act Works

• Entities that can be lienholders:
  
  • **Health Care Professionals**: LICENSED physician, dentist, optometrist, naprapath, clinical psychologist, or physical therapist.
  
  • **Health Care Providers**: LICENSED hospital, home health agency, ambulatory surgical treatment center, long-term care facilities, or emergency medical services personnel
How the Lien Act Works (cont.)

- **NOTICE Requirements:**
  - **Contents:**
    - Name & address of injured person
    - Date of injury
    - Name & address of provider/professional
    - Name of party alleged to be liable to injured person
  - **Service**
    - Via certified mail, registered mail or in person
    - Served on injured person & party “against whom the claim or right of action exists”
    - Who else you should serve?—all attorneys, insurance carriers
How the Lien Act Works (cont.)

- Allocation of Proceeds (verdict, judgment, award, settlement, or compromise):
  - 20% to Provider category (all providers with valid liens share pro-rata)
  - 20% to Professional category (all professionals with valid liens share pro-rata)
  - Any unused portion re-assigned to other category
  - No category of lienholder may exceed 1/3 of the proceeds
How the Lien Act Works (cont.)

SETTLEMENT/PI RECOVERY:

Providers:
Hospital, home health, ambulatory surgical treatment center, long-term care facility, emergency medical services personnel

Professionals:
Physician, dentist, optometrist, naprapath, clinical psychologist, physical therapist

Unused portion re-allocated to other category, not to exceed 1/3 of settlement

20% → Unused portion re-allocated to other category, not to exceed 1/3 of settlement → 20%

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Med-Pay

• **What is Med-pay?**
  
  - A provision your patient may have on his/her automobile policy that will cover medical charges regardless of fault.
  
  - Others in household may be eligible for benefits (ie. patient does not necessarily have to be policy-holder).

  • Crucial for single-car accidents or where your patient is deemed at-fault.
Med-Pay (cont.)

- Often covers policy-holders who are bicycling and get into an accident with a vehicle or pedestrians hit by car.
- Fingers slammed in door? Stung by bee while driving? Sports injuries at school? Slip & fall?

Third-Party Liability

• Insurer for the “at-fault” party

• Passenger may have med-pay claim, TPL claim against driver of that vehicle, TPL claim against drivers of other vehicles

• What if driver of vehicle is not the owner?

• Your patient t-boned another driver – does that mean your patient is at fault?
Sending Out Your Documents

• THE RACE – Whose team is fastest/best?
• Should you send UB/HCFA to insurer prior to sending out notice of lien?
• Should you wait until you have identified all of the parties before sending out lien notices?
• Cover letter identifying accounts.
• Importance of claim numbers.
Interplay between Lien Act & Medicare/IDPA

- MSP and Federal Case Law
  - *American Hospital Assoc. v. Sullivan*
  - Intent of MSP Statute & regs: “to reduce the cost of the Medicare program by requiring Medicare to pay ‘secondary’ to alternate sources.” *U.S. v. Sosnowski.*
  - *Holle v. Moline Public Hospital* – May not maintain lien on Medicare adjustment amounts after Medicare payment.
Interplay between Lien Act & Medicare/IDPA (cont.)

- IDPA and Health Care Services Liens
  - Medicaid established through Title XIX to the Social Security Act, 42 U.S.C. § 1396
  - Once state elects to participate in Medicaid, **must comply** with federal statutory and regulatory requirements. *See S.D. ex rel. Dickson v. Hood*
  - Congress intended that Medicaid be a payer of last resort. *Ark. Dept. of Health and Human Servs. v. Åhlborn*
  - *But* provider/professional may only maintain lien on patient portion (spend-down amount) once Medicaid has been billed and made payment. *Evanston Hospital v. Hauck*
Interplay between Lien Act & Medicare/IDPA (cont.)

• Medicare Lien and Public Aid Lien have priority over other liens

• What does that mean?

• No Illinois case law interpreting whether the Medicare/IDPA Lien recovery comes off the top of the settlement, is calculated by the nature of the entity that received payment (ie. provider/professional) or taken out of patient’s portion of settlement.
Common Tricks Used to Reduce/Avoid Your Lien Recovery

- **Common Fund Doctrine** – Patient’s attorney will argue that you must reduce your lien amount by 1/3 to pay your fair share of his/her attorney’s fees. Wrong – IL Supreme Court rejected 5th District’s ruling in Wendling v. Southern Illinois Hospital Services. An offshoot of this argument is simply requesting you to take the “standard 1/3 reduction.” There is no standard 1/3 reduction.
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• **Lumping all lienholders together:** Sometimes there are huge liens on one side of the equation (e.g., very high hospital lien) but relatively small liens on the other side (smaller physician’s liens). Rather than offering the Lien Act amount, attorneys will often group ALL of the liens together and calculate a pro-rata distribution on 40% of the settlement, or sometimes even on 30% of the settlement.
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

- Including all sorts of inappropriate bills and charges into the Lien Act calculations:
  - Subrogation Liens
  - Un-liened bills
  - “Lost wages” reduction
  - Case advance repayment obligations
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• Services not related:
  • Often a patient’s attorney will allege that the services are not related to the accident. Sometimes they’re correct. A patient’s belief that the services are related does not necessarily make them so. A review of the diagnoses and the medical records is helpful. Other considerations – did patient’s attorney include bill in demand packet to insurance? Is there any record of the insurer disputing the services as being unrelated?
  • *Dollieslager v. Hurst* case.
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• **Charges not reasonable or necessary:**
  • Lien Act provides that lien is for the amount of “reasonable charges.”
  • Lien Act does not require lienholder to prove that services were “necessary.”

• **Comparative Fault:**
  • Patient’s attorney may argue that patient’s recovery has been reduced by 40% because patient 40% at fault, so you should reduce your lien by 40%. This results in a double reduction, however.
  • A provision regarding “comparative fault” was added to the Lien Act, but only applies to subrogation liens.
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• You failed to provide medical records or free medical records:

  • Some attorneys, and even some insurance companies, will cite to Section 25 of the Lien Act as support for the proposition that you must provide free medical records within 20 days.

  • Only applies to party to a pending court action against whom a claim for damages has been asserted.

  • Still requires subpoena or auth. from patient/patient’s representative
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• “Sorry, we disbursed funds before receiving your lien,”
  • Insist upon documentation proving the date of disbursement, and compare with the date your green card was signed.

• “Patient’s attorney told us to issue payment to him/her, so we left your name off the check.”
  • Completely inappropriate. Insurance company doing this does so at its own peril.

• Patient filed Bankruptcy:
  • If your lien was served prior to the filing of Bankruptcy, it will survive. Gaskill v. Sanders.

• Patient is a minor:
  • Lien is valid against a minor patient’s personal injury recovery. In re Cooper.
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

- Patients’ attorneys will sometimes argue that you were required to bill IDPA or Medicare.
  - See earlier slides.

- Patients’ attorneys will argue that you were required to bill patient’s health insurance.
  - Very much a hot issue
  - House Bill 5823 (proposed amendments to the Lien Act) contained language limiting a lienholder’s recovery to the amount patient’s health insurance or “public benefits” would pay for the bill. That proposed language was stricken from the final version of the amendment which went into effect 2013.

- Status of Illinois Case law.
  - 2nd District Decisions vs. 4th District Decision regarding balance billing.
  - Review your contracts carefully!
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• Patients’ attorneys are now arguing that you must subtract off their attorneys’ fees and costs off of the settlement first, before applying the Lien Act percentages.
  
  • *Stanton v. Rea*
  
  • Same district that was overturned by Supreme Court in *Wendling*.
  
  • Essentially a new analysis to arrive at the same result the Supreme Court rejected. Example: Assume a $9,000.00 settlement, a $3,000 hospital lien and a $3,000 attorney’s lien. Applying Appellate Court’s rejected reasoning in *Wendling*, you would reduce hospital’s lien by 1/3 for common fund, reducing it from $3,000 to $2,000. Supreme Court said no. Now in *Stanton v. Rea*, Appellate Court would have you reduce the $9,000 settlement by $3,000 in attorney’s fees, and apply the Lien Act percentages to the remainder: 1/3 of $6,000 = $2,000.
Common Tricks Used to Reduce/Avoid Your Lien Recovery (cont.)

• Lien Adjudication
  • What is a Lien Adjudication?
  • Who can bring it?
  • Who has to be served?
  • What happens if you don’t show?
Other Considerations

• Releases – Beware!!
• Restrictive endorsements on settlement check
• Med-pay exhaust ≠ no further payment from TPL
• Fraudulent endorsement issues
Cases

• *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 585-86 (5th Cir. 2004).
• *Evanston Hospital v. Hauck*, 1 F.3d 540 (7th Cir. 1993).
Questions?

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