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When medical liens complicate justice

The lien-doctor dilemma

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As a firm that focuses on litigation and trials, our office has started to see a rise in personal-injury claims being handled in the pre-litigation stage by the medical field on a lien. This trend may at times be of some benefit, but often, there are significant negative side effects if the case goes into litigation or trial.

For those patients who have no insurance, the benefit of obtaining medical care on a lien are substantial and may be their only option for obtaining timely treatment. Care on a lien is a huge benefit that the medical community provides when the injured person has no other option for proper timely treatment. In addition, there are often circumstances that may justify obtaining treatment on a lien even when certain types of insurance are available, like Medi-Cal and Medicare. These insurance providers are often so limited in what treatment can be obtained or the list of providers so limited that the ability to use insurance is illusory.

However, when an injured plaintiff obtains treatment on a lien when they have insurance and their own primary doctor that they use for other treatment, the obvious question is “why?” If the case ends up in litigation or in trial, the defense will automatically attempt to assert that it is because the treatment was not necessary or that the bills are inflated for damage purposes and attack the credibility of your case and witnesses by arguing that it establishes a bias. The truth will not matter, the defense only cares about the implication and will attempt to take advantage of the situation regardless of the merits of the argument.

Every attorney and potential client must properly assess the advantages and disadvantages of having their medical treatment done on a lien basis. If these issues are not properly addressed, then the attorney and potential client may severely damage the ability to properly present the evidence and the case. Recently, our office has had to decline several legitimate cases where the client had used lien doctors that failed to follow proper protocols for treatment and went straight to surgery when lesser invasive treatments should have been attempted first, and the bills asserted were three times the usual and customary rates.

Defense strategies during deposition

Our office has seen situations where a surgeon’s deposition was taken and the defense attorney attacked the treatment as being unnecessary and asserted that there was a lack of foundation for the surgery. The defense expert may highlight a failure to attempt conservative care before recommending the invasive surgical procedure. Additionally, as is often seen with lien-based treatment, the surgeon’s bill can be inflated. The defense may also seek to show that the lien was “contingent” on the case outcome in an effort to suggest bias.

Attacks on client and attorney credibility

In addition, our office has seen situations where a defense attorney may attack the client’s credibility for treating through a lien rather than using his own health insurance, arguing the client failed to mitigate his damages with insurance, instead choosing expensive treatment.

Further, the client may be questioned about whether it was the attorney who referred the potential client to the lien doctor.

Legal precedents and referral evidence

The issue of referral evidence was recently addressed in *Qaadir v. Figueroa*. The defendant in *Qaadir* contended that the trial court committed prejudicial error when it excluded evidence that plaintiff’s attorney referred him to the lien-physician. Defendants argued that the referral evidence was relevant to how the amounts of the medical bills were set, i.e., [to] how the lien-physicians set their billed charges was influenced by the fact that the amount they recovered was directly linked to what Plaintiff recovered at trial. In short, defendants contended the referral evidence was relevant to demonstrate the lien-physicians’ incentive to inflate the bills.

The *Qaadir* court agreed that the trial court erred, stating that “the referral evidence was relevant to the question of the reasonable value of the lien-physicians’ medical care because it may show bias or financial incentives on the part of the lien-physicians. If a lien-physician wants future referrals from a lawyer and understands that the lawyer benefits from inflating a client’s medical bills, that incentive might encourage the lien-physician to inflate its current bill to please the lawyer and win future referrals.” (*Qaadir v. Figueroa*, 67 Cal.App.5th 790, 808 citing Evidence Code §§ 210 and 350.)

Every attorney and potential client must understand these issues and anticipate how they will be addressed should the case go to litigation.



Managing bias with a motion in limine

If your client treated on a lien basis, it is crucial to address potential bias issues with a motion in limine. Seek to exclude any evidence of the plaintiff’s insured status when they have chosen to treat outside their coverage. Assume the defendant will attempt to introduce the fact that the plaintiff treated with providers on a lien basis, then preclude this evidence with a motion in limine pursuant to Evidence Code section 352.

The purpose of such a motion in limine is to avoid the obviously futile attempt to “un-ring the bell” in the event a motion to strike is granted in the proceedings before the jury. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337; 3 B. Witkin, California Evidence (3rd ed. 1986) Introduction of Evidence at Trial, § 2011, p. 1969.)

The Evidence Code section 352 motion has the importance not only to accomplish exclusion of harmful testimony or other evidence, but in preserving the right to appeal the ruling. (*People v. Jennings* (1988) 46 Cal.3d 963, 976.)

Assert that the potential for prejudice significantly outweighs the probative value of such evidence, as the jury may form biased conclusions upon learning of the attorney’s referral to the physician. Additionally, jurors might erroneously assume that the lien is dependent on the case’s outcome, leading them to believe that the treating physician has a vested interest in the case. This situation would compel the

plaintiff to engage a billing expert to attest that the treatment costs are reasonable and that the client is liable for the bill, regardless of the case’s result. Consequently, this would lead to an undue consumption of time.

If the evidence establishes that the bills are not inflated, that the treatment was legitimate for the injury and that there is not a basis for foundation, then the evidence of lien should have no probative value and should not be introduced.

You should also cite to CACI No. 113, the court’s own pretrial instructions on bias, as a reason to exclude or at least restrict this testimony and line of questioning as much as possible. It is also crucial to argue that whether the plaintiff received treatment on a lien basis is a collateral and irrelevant issue. The primary focus in the trial concerning medical treatment should be whether it was reasonable and necessary, as outlined in CACI 3903A.

Pebley addresses liens and insurance coverage

The Court of Appeal squarely addressed the issue of failure to mitigate damages in a case involving liens in *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266. The court held that a plaintiff who obtains medical services outside of his insurance coverage should be treated as uninsured and that a plaintiff does not have a duty to “mitigate his damages” by treating within his coverage. (*Id.* at pp. 1276-1277.)

Conclusion

In conclusion, medical liens should be avoided unless no other option is available for immediate treatment. While medical liens may seem advantageous in the short term, they often lead to significant legal and financial complications. Therefore, clients should be advised to use their health insurance for medical treatments whenever possible, reserving medical liens only as a last resort.

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