Legality and Ethics of Lien Uses in Medicine

by Ciara Chambers, JD & Liz LaFoe, JD

Providers must analyze the situation at hand before deciding to enter into a lien with a patient.

The *Wall Street Journal* recently published an article about the "little-known but growing practice" of doctors taking payment through liens tied to wins in court.[1] A lien is a legal right to a portion of an asset. When physicians provide services to treat patients on a lien, it means the patient immediately receives treatment, and payment of the bill is deferred.[2] The treating physician then waits to be paid until the personal injury claim is settled or resolved.[3] After the personal injury attorney has obtained a verdict or a settlement, the personal injury lawyer will pay that medical bill directly from the amount obtained.[4] The *Wall Street Journal* article states that a "spate of legal and legislative changes has led to a proliferation of the practice in California and other states, including Florida, Colorado, Texas, and Georgia. . . ."[5] Financing companies that buy liens from doctors before litigation is complete are also becoming more common with the practice.[6] The purpose of this article is to examine the ethics and legality of health care liens in Missouri, as well as to discuss the logistics, and risks and benefits, of such arrangements.

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Ethics of Liens in Medicine

According to the American Medical Association (AMA), "physicians must recognize responsibility to patients first and foremost, as well as to society, to other health professionals, and to self."[7] The first AMA principle of medical ethics states: "A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights."[8] Other principles of the AMA ethics require physicians to respect the rights of others, advance scientific knowledge, contribute to the betterment of public health, and regard responsibility to patients as paramount.[9] The sixth principle states that physicians shall be free to choose whom to serve (except in emergencies), with whom to associate, and the environment in which to provide medical care.[10] The final principle requires physicians to support access to medical care for all people.[11]

Similarly, the American Osteopathic Association (AOA) also has a code of ethics "designed to address the osteopathic and allopathic physician's ethical and professional responsibilities to patients, to society, to the AOA, to others involved in health care, and to self."[12] Section 12 of the AOA Code of Ethics states "Any fee charged by a physician shall compensate the physician for services actually rendered. There shall be no division of professional fees for referrals of patients."[13] Section 13 requires physicians to respect the law.[14]

Although the AMA and the AOA have not publicized a formal written position on the use of

liens by health care providers, and nor have other physician specialty groups (e.g., American Orthopedic Association, the American Academy of Family Physicians), the ethics of such arrangements have been examined in recent articles, and the consensus of medical experts appears to be that the use of liens by health care providers, when permitted by state law, is not unethical.[15] Both the AMA and the AOA ethical principles support that physicians are entitled to fair compensation for their services. The AMA's final principle specifically encourages physicians to support access to medical care for all people. As discussed further in the sections below, liens may allow patients who are uninsured to receive healthcare that they would not otherwise be able to afford. Also as discussed below, healthcare provider liens are lawful by statute in Missouri. Thus, there is no inherent conflict between a physician's ethical duty to follow the law and payment per a lien arrangement in Missouri.

Medical Liens in Missouri

Health care provider liens are allowed by statute in Missouri.[16] The purpose behind Missouri's medical lien statute is to ensure injured patients are promptly treated without consideration of their ability to pay and to also financially protect health care providers to enable them to continue to provide care.[17] Experts in personal injury cases answered that the practice happens in Missouri, but it is not extremely common.[18]

Stephen M. Gorny, a personal injury attorney located in Kansas City, states that ninety-nine percent of his practice is personal injury, including "medical negligence, vehicular collisions, premises liability, and product liability," and that he does not deal with the practice of health care providers working on a lien basis very often.[19] For Mr. Gorny, when clients utilize this type of lien, they have typically suffered a serious injury and as a result, cannot find a physician to offer services as they would be "simply too expensive."[20]

The people who most commonly use these liens are those that are uninsured. Mr. Gorny stated he could not think of a single patient in twenty-six years who opted to use a lien instead of their health insurance.[21] He explained, "The reason is simple. My clients pay for their health insurance. If liability has not yet been established and their contracted-for health insurance is going to pay their expenses, they should get the benefit of that bargain."[22] Instead, their carrier may have a subrogation interest and recover a portion of the amount expended from the ultimate settlement or verdict. Contrast that with a physician lien. In that circumstance, the health care provider will typically request a much higher reimbursement."[23] Additionally, healthcare providers may have to accept a patient's health insurance, depending on the language in the provider's agreement with a health insurer – in these cases, liens are unlikely to be an option.[24, 25]

How the Practice Works

The Missouri Hospital and Health Practitioner lien statute, RSMo. Section 430.225, is the relevant statute for a Missouri's physician lien.[26] Hospitals, clinics, and "health care practitioners" in Missouri can use liens for their services.[27] The "health care practitioners" included in the statute include: (1) chiropractors; (2) podiatrists; (3) dentists; (4) physical therapists; (5) physicians or surgeons; and (6) optometrists.[28] In some circumstances, physicians may also enter into a private agreement with a patient, usually facilitated by an attorney, to receive all or a portion of their medical bills out of a damages award or settlement.[29]

The lien statute is applicable to any person "to whom a health practitioner, hospital, clinic, or other institution delivers treatment, care or maintenance for sickness or injury caused by a tort-feasor from whom such person seeks damages or any insurance carrier which has insured such tortfeasor."[30] The Missouri lien statute applies to anybody with any kind of health insurance, or no insurance at all.[31] Thus, when a person is injured and seeks compensation from the person responsible for the injury, any treating medical providers can assert a legal claim on the settlement to satisfy the medical bills stemming from that injury, except in circumstances where they are barred from doing so by their contract with a specific health insurer, as discussed above.[32]

The lien statute states that, "If the liens of such health practitioners, hospitals, clinics, or other institutions exceed fifty percent of the amount due the patient, every health care practitioner, hospital, clinic or other institution giving notice of its lien, as aforesaid, shall share in up to fifty percent of the net proceeds due the patient, in the proportion that each claim bears to the total amount of all other liens of health care practitioners, hospitals, clinics or

other institutions."[33] The "net proceeds," as used in the statute, means the amount remaining after the payment of contractual attorney fees, if any, and other expenses of recovery.[34]

Providers must "perfect the lien," by sending notice of the bill to the at-fault party.[35] The steps to do this are set out in RSMo. Section 430.240.[36] No lien will be effective without written notice containing: (1) the name and address of the injured person; (2) the date of the accident; (3) the name and location of the hospital; and (4) the name of the person(s), firm(s), or corporation(s) alleged to be liable to the injured party for the injuries received.[37] This notice must be sent by certified mail with return receipt requested to the allegedly liable party or parties.[38] The provider shall also send a certified copy with return receipt requested to the insurance company which has insured such person, firm, or corporation, against such liability.[39]

Therefore, so long as the lien is properly asserted, when the check for the settlement or jury verdict arrives to the plaintiff's lawyer, the lawyer must pay the provider the balance owed to them.[40] However, no matter what happens in the settlement or at trial, the health care practitioner can only receive 50% of the balance of the settlement. Here is a hypothetical example:

If we get a settlement for a car accident for $10,000. And let's say our attorney's fees that we charge are a third so that's $3,300 dollars. And let's say we had some case expenses that we had to advance to get the settlement so let's say when it's all said and done, after attorney's fees and expenses there's $6,000 left to go around. So, $6,000 remains out of that $10,000 global settlement. So what do the facilities get? What do the doctors get? Well, it depends on the amount of the bill. But the law says that out of the remaining $6,000 dollars that is left after our attorney's fees and case costs, all of the facilities, all of the doctors who have liens or bills, will only be able to get a total of $3,000 dollars out of the $6,000. So that statute says that 50% of the remaining balance of the settlement goes to the claimant, being the patient/client.[41]

As for how it works in practice, Mr. Gorny stated that he personally knows "a number of attorneys who work under these provisions for somewhat minor procedures, chiropractic care, and physical therapy," but that most providers who accept liens treat serious injuries.[42]

Brendan Buckley, a personal injury attorney at Edelman & Thompson in Kansas City, also works with Missouri's medical provider liens, in addition to other types of liens.[43] Mr. Buckley stated that when someone comes to him with medical injuries, and they do not have, or do not wish to use, their health insurance, he will suggest three to four providers to contact for treatment who may agree to work under a lien.[44] He assures the providers they will be reimbursed from the damages award or settlement, and he will formally acknowledge the lien.[45] Based on a recent Missouri case, such agreements are still subject to the statutory limitation (fifty percent cap).[46]

Mr. Gorny explained that when a client cannot pay a bill or there are no insurance options or means to pay a health care bill, he is "always happy to speak to a physician to explain the circumstances, the merits of the case, and their likelihood of being compensated from that case."[47] He added that he does not encourage physicians to do "anything other than what they are comfortable with."[48]

Legal Issues with Liens

As discussed above, lien arrangements, when utilized properly and in accordance with state law, do not violate medical ethics rules.[49] Ethics aside, there are other concerns. Defense lawyers, such as Greg Minana, a partner at Husch Blackwell in St. Louis, believe lien arrangements can potentially drive up the litigation costs.[50] Mr. Gorny also admitted that these liens can drive up the costs of settling a case.[51] Mr. Buckley stated plaintiffs can receive more in damages because insurance companies usually discount provider rates under health insurance, and when insurance is not used, providers can bill the full amount.[52] This makes it appear the plaintiff has more monetary damages than if they had used their insurance, and the full amount of the provider bill can be submitted to a jury.[53]

Defense counsel may argue that if a treating physician is testifying, the doctor has an interest in the monetary outcome of a case, it may make them biased.[54] Mr. Minana noted his concerns about a doctor's credibility and believed the lien arrangement may be admissible at trial during the provider's testimony.[55] The defense may argue the treating physician has a "bias" because he/she can potentially benefit from a larger verdict or settlement, and therefore, the jury may learn of the arrangement.[56] These sorts of issues in practice are left to the

discretion of the trial judge and may depend on the factual circumstances of the particular case.[57]

One potential problem with liens for health care practitioners is that, under Missouri's statutory liens, the providers can only "share in up to fifty percent of the net proceeds due the patient."[58] Therefore, if a case settles for an amount where the 50% amount will not cover the full extent of the provider's bill, then the provider cannot be paid their full bill.[59] When this occurs, treating health care practitioners receive a pro rata share of the 50% proceeds allocated towards provider bills,[60] and must accept this to satisfy their charges .[61]

In addition to the monetary cap on providers, providers must also "perfect the lien," by sending notice of the bill to the at-fault party.[62] It may be difficult for a provider to determine who the at-fault party is. For example, a plaintiff may not know who caused the accident that resulted in their injuries. In these circumstances, it may help to reach out to the plaintiff's lawyer to help obtain information.[63] Some provider groups gather information up front, such as: (1) How much insurance coverage is involved? (2) Are there liability issues? (3) How significant was the auto crash? (4) Has the client made other personal injury claims in the past? and (5) Does the client have pre-existing issues related to the injured body part?[64] In some situations, such as an emergency after a motor vehicle accident, it will likely be difficult, if not impossible, for a provider, such as a hospital, to obtain the needed information up front.

For those plaintiffs who have health insurance, including Medicare and Medicaid, it may be more valuable for a patient to use their insurance rather than a lien arrangement, depending on the quality of the health insurance and amount of out of pocket costs (*e.g.,* deductible).[65] Mr. Buckley advised that plaintiffs may be able to use a lien rather than their health insurance, but, as discussed above, for most health insurance contracts, there is a contract provision stating that the treating physician must accept the plaintiff's health insurance.[66] Mr. Buckley added that only in a few instances he would encourage a plaintiff to file a lien over their insurance.[67] An example of this may be when someone is in an accident and the commercial insurance carrier involved has unlimited insurance relative to the claim, and the patient's health insurance would not ordinarily pay that much for medical expenses.[68]

The Benefits of Utilizing Liens

One common benefit of using a lien arrangement is that this can give the uninsured patient access to higher quality care, especially with the rising costs of medical care and health insurance in the United States.[69] The physician may also be able to help a patient going through a difficult financial situation, and further their Hippocratic Oath.[70]

For a physician, working on a lien basis can be lucrative.[71] Physicians who work on these liens can receive reimbursement at likely a higher rate than their contractual rate with an insurer.[72] Some plaintiff's attorneys claim they can make a physician more money with a lien than if the physician billed the claims through health insurance.[73]

Should Physicians Work on a Lien Basis?

Not all physicians accept liens as a basis for payment. The largest risk for physicians is that the plaintiff will not win the lawsuit or receive a settlement and the provider will be uncompensated or 50% of the award will not fully compensate the provider.[74] Physicians also cannot be certain if they will be paid the entire portion of the bill for their services.[75] An additional risk is that providers must wait sometimes six months to a year (or years) for the resolution of a plaintiff's case.[76]

The greatest recommendation Mr. Gorny says he can give to a provider who is considering treating a patient on a lien basis is to do his or her homework on the lawyer involved.[77] Mr. Gorny added, "I am certain there are a number of lawyers who will create difficult situations for physicians when the doctor went out of their way to treat the patient on a lien basis."[78] Mr. Gorny explained that he believes the reputation of the lawyer goes a long way.[79] He stressed that providers will work with him because they learn he does not take frivolous cases, he pays all lien holders and subrogation interest holders, and he ensures the provider receives all the information necessary to evaluate whether to treat or continue to treat the client on a lien basis.[80] Mr. Gorny advises that lawyers who have a poor record of paying lien holders and subrogation interest holders, as well as those that do not provide the necessary information to physicians to allow them to appropriately weigh whether to work on the lien basis or not should spark red flags for treating providers.[81] Mr. Gorny mentioned that some physicians simply do not accept liens because they

distrust the legal process or the lawyers involved, or their ability to get paid.[82]

If a physician is going to offer the contractual service, the physician should be prepared to testify on the merits of the case.[83] Failure to testify regarding the case was described by Mr. Gorny as "throwing money away."[84] When testifying at trial, the jury may not ever know the treatment was performed on a lien basis.[85] If the defense chooses to bring up the treatment was performed on a lien basis, then the jury may learn the plaintiff lacks the financial means to pay for the treatment and gain sympathy for the plaintiff.[86]

Mr. Buckley also advised that lawyers, law firms, and medical providers keep relationships professional when liens are involved.[87] He advises lawyers to give their clients multiple options of treating physicians so the decision making process is transparent.[88] Providers should receive information and an agreement from counsel but consider avoiding entering into any type of ongoing relationship.[89] A type of "referral" arrangement is discouraged.[90] Close relationships with plaintiff's counsel and referral arrangements can impact a provider's reputation.

Conclusion

Provider liens can provide a useful tool for uninsured plaintiffs who have been badly injured. However, they also pose risks for the providers who agree to them. Providers must analyze the situation at hand before deciding to enter into a lien with a patient.

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