

Ten steps in negotiating private health insurance liens

By Jonathan Bakhsheshian

Dealing with private health insurance liens can be tricky. But there are many tactics in reducing the total lien amount. Work zealously and diligently in negotiating the final lien amount early on in the case to ensure maximum recovery for your client.

Private Health Insurance Liens

After an incident, the injured victim will seek medical treatment. Emergency care, medical imaging, and surgeries can cost a lot. When health insurance is available, these charges will be covered by the health insurance company. This will create a lien, which is a legal right that a creditor has in another's settlement until that debt is satisfied. (See *Black's Law Dictionary* (10th ed. 2014).) The lien is created for the expenses provided for the medical treatment to the injured victim and is attached to the settlement or judgment. Health insurance companies have subrogation rights, which is the right to recover the cost of medical care paid by the health insurance company from the third party who is

responsible for the injuries. Accordingly, reimbursement of the lien must be made from the settlement or judgment awarded to the injured victim.

Once you have obtained the injured victim's medical records for the care rendered following the incident, determine what providers were paid by a health insurance plan. Reach out to its representative and obtain a copy of its lien, along with a full breakdown of the charges. Make sure to read the terms and conditions of the lien. Different health insurance policies and liens are governed by different laws. Make sure to also read the language of the health insurance contract. Some contracts are governed by the Employee Retirement Income Security Act (ERISA) of 1974. Other insurance plans are not.

Ten Steps to Reduce the Lien

1. Reduce for unrelated charges

Once you have reached out to each lien claimant at the beginning of the case, and advised them that you are aware of their claim, keep in touch with them as the case progresses. Obtain a full breakdown of the charges as often as needed. This will give you the opportunity to review the charges and reduce the charges for treatment unrelated to the third-party injury. Lien claimants are not experts and chances are, they will include all treatment in the lien that followed the date of the incident. Make sure to review each provider and each visit, obtain medical records of those visits, and notify the lien claimant of any unrelated

charges. Make sure no unrelated visits, such as visits for a cold or flu or for injuries that are not being claimed as part of the suit are removed from the breakdown of charges. This process will also help build rapport with the lien claimant.

2. Reduce for unreasonable charges

Just like medical providers reduce their bills for cash patients or accept adjustments by health insurance providers per their contract terms, make sure to review the breakdown for unreasonable charges. You want to ensure that you are provided with the same benefits that the lien claimant was provided had the bill been satisfied through their agreement with the medical provider. Do not let the lien claimant recover an excess amount that would allow them to profit from the recovery. They are only entitled for what was paid out and what would be paid out. Also check for unreasonable charges for any medical equipment or medical treatment that does not fit the standard and customary rate for the treatment. This is often seen with charges for consultations with specialists, hospital visits and fees, and prescriptions.

3. Reduce for comparative fault

If the injured victim's own negligence contributed to their injury, and their negligence was a substantial factor in causing their harm, the injured victim's damages are reduced by their apportionment of fault. If the injured victim was apportioned fault, make sure to include that in the reduction.



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By way of example, if the injured victim was found to be twenty percent at fault for the incident, reduce the total claimed lien amount by twenty percent. Even though the health insurance company is entitled to full reimbursement, their rights are also subject to any affirmative defense proved by the third party whose negligence contributed to the injuries.

4. Apportion for claimants

If there are multiple injured victims or a loss of consortium claim, apportion the recovery to each injured victim and each claimant. Often times, a global settlement is made. Point out that the recovery was a compromise contemplating each injured victim's injuries and claims. Proceeds from other claimants should not be considered in reimbursing liens.

5. Reimbursement for out-of-pocket payments

The breakdown of charges will not always include the co-pays, deductibles, or other out-of-pocket payments made by the injured victim. Obtain copies of all paid invoices, receipts for co-pays and deductibles, and all other payments. Submit them to the lien claimant as part of the satisfaction of the lien. If the amounts were taken into consideration by the lien claimant, make sure to include that in the breakdown when calculating the total settlement offer as credit. When dealing with lien reductions, even credits applied are helpful in making a reasonable offer

in satisfaction of the lien.

6. Determine the portion of the settlement related to medical bills

When negotiating, determine the breakdown of the settlement or judgment. Calculate the amount of the total recovery that was apportioned for the medical bills. If the case resolves for \$50,000, with \$35,000 in medical bills and a health insurance lien, and where \$25,000 was paid for medical specials, the claimed lien amount must not exceed \$25,000. The lien claimant should not be reimbursed from the portion paid to the injured victim for pain and suffering, lost wages, or any property damage claims. Review the justifications for the reduction provided by the adverse party and consider the same when negotiation with the lien claimant.

7. Priority of liens

Discuss other liens and priority of attorney liens to help reduce the potential recovery by the lien claimant. Emergency care rendered by a hospital is a statutory lien. (See C.C.P. § 3045.1.) Private health insurance liens are primarily created through contracts. Attorney liens on contingency cases are also created through contracts. However, an attorney's lien has priority over any subsequent creditor's lien on the same action. (See C.C.P. § 2897; see also *Brown v. Super. Ct.* (2004) 116 Cal. App.4th 320, 328-29.) This includes a lien from a health insurance carrier. (See *Gilman v. Dalby* (2009) 176 Cal.App.4th

606, 617-20.) When there are competing attorney's liens from prior discharged attorneys, as a matter of law, the order of priority of liens starts with the first attorney assigned on the matter. (See *Hansen v. Jacobsen* (1986) 186 Cal.App.3d 350, 356-58.) Settle liens by priority to ensure that no excess recovery is disbursed to any of the lien claimant that conflicts with the order of the liens and there is no disruption to any lien claimant's rights.

8. Consider the Made Whole Doctrine

The Made Whole Doctrine is a common law principle that limits the lien claimant's reimbursement where the injured victim has not fully recovered by the third party settlement or judgment. (See *21st Century Ins. Co. v. Superior Court* (2009) 47 Cal.4th 511, 519.) The Made Whole Doctrine states that an insurance company may not enforce its subrogation rights until the injured victim has been fully compensated for their injuries. (See *Progressive W. Ins. Co. v. Yolo Cty. Super Court* (2005) 135 Cal.App.4th 263, 274.) In essence, the Made Whole Doctrine eliminates repayment to the lien claimant. In determining whether the injured victim has been made whole, the Made Whole Doctrine does not take into consideration the attorney's fees or costs paid by the injured victim. (See *21st Century Ins. Co. supra*, 47 Cal.4th at 527.) In determining whether the injured victim was made whole, calculate the settlement or judgment portion that was paid towards medical bills, lost wages, future medical care, and pain and suffering.

If the final amount does not compensate the injured victim to sit in their pre-injury status, consider arguing for a waiver of the entire lien amount. In California, the doctrine also applies to a lien claimant for medical payment (med-pay) paid by an insurance company. (*Id.*, at 527.) Under the doctrine, attorney fees can properly be allocated between the injured victim and the health insurance according to the same pro rata apportionment rule that is analogous to the Common Fund Doctrine.

9. Consider the Common Fund Doctrine

The Common Fund Doctrine provides a limitation on an insurance company's ability to recover funds from the injured victim's settlement or judgment. (See C.C.P. § 3040.) Under the Common Fund Doctrine, an insurance company that does not participate in the underlying action must pay a pro-rated share of the attorney's fees and costs. (See *Progressive W. Ins. Co.*, *supra*, 135 Cal.App.4th at 275-76.) The doctrine is incorporated into insurance contracts. (*Id.* at 281.) If the doctrine applies, the insurance company's reimbursement must be reduced proportionately to reflect the attorney fees paid by the injured victim. The Common Fund Doctrine provides a pro rata reduction for attorney's fees incurred and allows a reduction in payback by one third or forty percent, whatever fee amount charged to the injured victim. For example, on a \$21,000 lien with a one-third attorney fees clause, the lien amount should not exceed \$14,000. Note that plans that are covered by ERISA will not give credit for attorney's fees as a discount to what is owed. California Courts have also held that the Common Fund Doctrine does not apply to lien claimant for med-pay paid by an insurance company. (See *21st Century Ins. Co v. Superior Court*, 47 Cal.4th at 525.)

10. Settlement Disclosure

Attorneys have argued that releasing information regarding the settlement of an underlying personal injury action is unethical and violates the attorney client privilege. Other attorneys have argued that a settlement and cost breakdown is considered work product and should not be shared with any third parties. However, the ABA Model Rules of Professional Conduct R. 1.5 (2014) requires that a

settlement breakdown be provided to a lien claimant. Consider providing a full breakdown of the attorney fees, costs, and other amounts claimed by other lien claimants. This will allow for a more thorough settlement discussion where the lien claimant can consider all other fees paid out in determining its reasonable share.

Ethical Considerations

Never position yourself in negotiating liens after obtaining a settlement or judgment. It is acceptable to hold off when taking a case to trial, but the earlier an attorney starts the process the better the outcome. You do not want to leave yourself backed up against a wall. Consider obtaining final lien amounts as soon as the injured victim concludes their treatment. Begin the process early on and build a relationship with the lien claimant. This will put you in a better situation when negotiating at the conclusion of the case. Also, it will help you to have a better idea of what the injured victim's share will be when discussing settlement or attending a mediation for the underlying action.

ABA Model Rules of Professional Conduct R. 1.5 (2014) states that an attorney has an obligation to notify the client and all possible lien claimants of their possible subrogation rights, to promptly deliver any recovery the lien claimant is entitled to, and upon request, to render a full accounting of the recovery. The California State Bar has often taken the position that the attorney's fiduciary duty to the injured victim does not end with payment to the client. Rather, the attorney has an ongoing fiduciary duty to honor the injured victim's agreement to pay any liens subject to the client's authorization otherwise. Do not ever leave a client with a known unpaid lien. The injured victim can be liable to reimburse the lien. (See C.C.P. § 3045.5.) Make sure all possible lien claimants have been notified and cleared. Consider a hold-harmless agreement when disbursing the final funds to the injured victim.

Civility

Despite the many tools provided in negotiating private health insurance liens, it is important to maintain civility throughout the process. After receiving a lien, reach out to the lien claimant, give them a call,

and discuss settlement negotiations with the upmost respect. Sometimes, it is not necessary to rush into emails and letters when a simple phone call can resolve the lien. Building rapport with the lien claimant can prove useful. Chances are you will likely deal with the lien claimant again. Do not hesitate to establish a professional relationship with your adversary. It is invaluable. ■