COMMON HEALTH CARE LIABILITY LIENS

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COMMON HEALTH CARE LIABILITY LIENS

I. Introduction

Many defendants (and their insurance carriers) breathe a sigh of relief when final settlement papers or judgment are signed and entered. Defendants are relieved to finally move on with their lives without the cloud of a lawsuit, while their carriers hope to let the plaintiff and his/her attorney figure out how to pay all of the past medical bills and satisfy any existing liens. Defendants and their insurance carriers should be aware that, in many cases, a claim or lien for medical expenses may reappear if the plaintiff and his attorney do not appropriately satisfy obligations to certain lien holders. This paper will review common liens and subrogation interests in medical malpractice and other personal injury cases, provide some ways to minimize a defendant and his/her insurer's liability in these circumstances, and address remaining liability they may have even after the final settlement papers have been signed.

II. Texas Statutory Liens

Section 55 of the Texas Property Code contains several important liens of which defendants and insurers in a medical malpractice or personal injury lawsuit should be aware. This section of Texas law permits hospitals, certain physicians, and emergency medical services providers to file liens against a plaintiff's personal injury cause of action, settlement and/or judgment. TEX. PROP. CODE ANN. § 55.001 et. seq (Vernon 2001). In addition, Texas law permits persons who furnish rehabilitation services to recover medical expenses paid on behalf of a patient who is injured by a third-party tortfeasor. TEX. HUM. RES. CODE ANN. § 111.059 (Vernon 2001).

A. Hospital Lien Statute

The oldest and most common lien in personal injury lawsuits is the hospital lien. *See* TEX. PROP. CODE ANN. § 55.001 et. seq (Vernon 1995 & Supp. 2006). The purpose behind this statute was to provide hospitals an additional method of securing payment for services rendered to accident victims, encouraging them to treat injured patients. *See Baylor Univ. Med. Ctr. v. Travelers Ins. Co.*, 587 S.W.2d 501, 503 (Tex. Civ. App.–Dallas 1979, writ ref'd); *Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307 (Tex. 1985). In general, the hospital lien permits a hospital to attach a lien to a plaintiff's cause of action, settlement proceeds, or judgment for personal injuries when the hospital treated the plaintiff for those injuries. TEX. PROP. CODE ANN. § 55.003(a)(1)(2)(3) (Vernon Supp. 2006). The hospital lien statute also provides the hospital with a cause of action against an alleged third party tortfeasor for settling with the patient without paying the hospital bill regardless of the patient's obligation to pay his bill. *See McCollum v. Baylor University Medical Center*, 697 S.W.2d 22, 25 (Tex. App.–Dallas 1985)(construing a previous version of the Texas Hospital Lien Statute); *see also Daughters of Charity Health Services of Waco v. Linnstaedter*, 151 S.W.3d 667, 670-71 (Tex. App.–Waco 2004, pet. granted)(dissenting opinion citing *McCollum*). However, several limitations exist with respect to a hospital's ability to assert a lien pursuant to this statute.

For the lien to attach, the hospital must have admitted the plaintiff within 72 hours after the alleged injury occurred. TEX. PROP. CODE ANN. § 55.002(a) (Vernon Supp. 2006). For example, if a plaintiff is allegedly injured by a physician who fails to diagnose a condition, but the plaintiff is not admitted to the hospital for this condition until six months later, the hospital cannot assert a valid lien against the plaintiff's personal injury cause of action against the physician. If a plaintiff is admitted to a hospital within 72 hours, both the admitting hospital, as well as any hospital to which the patient is transferred for treatment relating to his initial injuries, may assert a lien against the plaintiff's cause of action, settlement proceeds, or judgment. TEX. PROP. CODE ANN. § 55.002(b) (Vernon Supp. 2006). Once a plaintiff is admitted to the hospital within the 72 hour window, if the hospital discharges the plaintiff and then later readmits the plaintiff, the hospital may include the subsequent charges for treatment as a part of the hospital lien, so long as the treatment is related to the initial injuries. *See Baylor v. Travelers,* 587 S.W.2d at 502-04.

Hospital liens only attach to causes of action, settlement proceeds, decisions of a public agency, and judgments for the *injured victim's* personal injuries. *See Tarrant County Hosp. Dist. v. Jones*, 664 S.W.2d 191, 194-95 (Tex. App.–Fort Worth 1984, writ ref'd n.r.e.) (emphasis added); *see also* TEX. PROP. CODE ANN. § 55.003(a) (Vernon Supp. 2006). Because wrongful death damage awards provide compensation to the surviving spouse, children, and parents of an alleged victim, hospital liens do not attach to these damage awards or settlement proceeds. *See id.* On the other hand, hospital liens will attach to settlements or judgments for survival claims, since a survival claim is the claim a deceased person would have had, had he or she lived. *See id.*

Hospital liens do not attach to claims under Texas Workmen's Compensation, the Federal Employee's Liability Act, or the Federal Longshore and Harbor Worker's Compensation Act. TEX. PROP. CODE ANN. § 55.003(b)(1) (Vernon Supp. 2006). A hospital lien also generally does not attach to the proceeds of an insurance policy in favor of the injured person or the injured person's beneficiary unless the proceeds are from public liability insurance for accidents or collisions. TEX. PROP. CODE ANN. § 55.003(b)(2) (Vernon Supp. 2006). However, public liability insurance does not include uninsured motorist recovery. *See Members Mut. Ins. Co. v. Hermann Hosp*., 664 S.W.2d 325 (Tex. 1984). Hospital liens also do not attach to claims against the owner of a railroad company who maintains a hospital in which the injured person is receiving medical services. TEX. PROP. CODE ANN. § 55.003(c) (Vernon Supp. 2006).

The hospital's lien may reflect only reasonable charges related to the initial injury and may only cover charges for the first 100 days of the patient's hospitalization. TEX. PROP. CODE ANN. § 55.004(b), (d)(1) (Vernon Supp. 2006). To prove that the charges were reasonable, the hospital must only show that the charges were at the customary rate charged to all patients, and the hospital need not establish that the charges were medically necessary. *See Baylor v. Travelers* , 587 S.W.2d at 506; *Garner v. City of Houston*, 323 S.W.2d 659, 662 (Tex. Civ. App.–Houston 1959, no writ). The reasonable charges that a hospital may recover under the hospital lien statute do not include attorney's fees or prejudgement interest as the statute does not provide for this recovery. *See Hermann Hosp. v. Vardeman*, 775 S.W.2d 866 (Tex. App.–Houston [1st Dist.} 1989, no writ). The statute also does not allow a plaintiff's attorney to reduce a hospital lien by claiming that the plaintiff is entitled to recover attorney fees from the hospital for the recovery. *See Bashara*, 685 S.W.2d 307.

Hospitals may be precluded from asserting a lien for services if the hospital was paid in full for services rendered to a patient, according to the terms of a contract or by law, by a medical insurer. *See Satsky v.U.S.*, 993 F.Supp.1027, 1028-30 (S.D. Tex. 1998) (interpreting an earlier version of the Texas Hospital Lien Statute). In *Satsky v. U.S.*, a Houston hospital attempted to enforce a hospital lien for total charges for an injured patient's medical expenses which it claimed exceeded the amount it accepted for the same services from the patient's health insurance provider. *See id.* at 1028. The court observed that the contract between the hospital and the health insurance provider indicated that the hospital agreed to accept the health insurance provider's payments as payment in full for services rendered to the patient. *See id.*

Noting that a lien can only legally attach if there is an underlying debt secured by the lien, the federal district court concluded that the statutory hospital lien was unenforceable because the hospital had already been paid in full for its services. *See id.* at 1029-1030. The federal court further opined that the Texas Hospital Lien Statute was "clearly not intended to overcompensate hospitals that accept patients who do have the ability to pay, nor to provide a windfall for hospitals who feel aggrieved by the circumscription of hospital charges by insurance plans." *See id.* at 1029.

When the right to assert a lien exists, a hospital must take specific action to preserve its lien. The hospital must file written notice of the lien with the county clerk where the health care services were provided *before* the defendant pays any money to the plaintiff in a settlement or judgment on the underlying cause of action. TEX. PROP. CODE ANN. § 55.005(a) (Vernon Supp. 2006) (emphasis added). The notice must contain the injured person's name and address, the date of the accident, the name and location of the hospital (or emergency medical services provider) claiming the lien, and the name of the person alleged to be liable for damages, if known. TEX. PROP. CODE ANN. § 55.005(b) (Vernon Supp. 2006). The county clerk is then directed to record the name of the injured individual, as well as the other information disclosed and index the record in the name of the injured individual. TEX. PROP. CODE ANN. § 55.005(c) (Vernon Supp. 2006).

Unlike certain other liens, a plaintiff may not force a hospital to reduce its lien to compensate the plaintiff for

attorney's fees expended in the recovery of the medical expenses. *See Bashara*, 685 S.W.2d at 308. The Texas Supreme Court determined in *Bashara* that a hospital had no duty to pay the plaintiff's attorney for services the attorney was already hired to perform for his client. *See id.* at 310. In addition, the statute is very specific that the hospital may recover the full amount of the lien subject only to the reasonableness of the charges. *See id*. at 309.

In order to discharge a hospital lien, the hospital (or emergency medical services provider) claiming the lien must file a certificate stating that the debt covered by the lien has been paid or released, with the county clerk in the county where the lien was filed. TEX. PROP. CODE ANN. § 55.006(a) (Vernon 2005). Once the clerk records the certificate and the date it was filed, the lien is discharged. TEX. PROP. CODE ANN. § 55.006(b-c) (Vernon Supp. 2006).

The statute provides that the hospital must make its records concerning the services provided available, upon request, to the attorney for a party by, for, or against whom a claim is asserted for damages as promptly as possible. TEX. PROP. CODE ANN. § 55.008(a) (Vernon Supp. 2006). These records are admissible, subject to the rules of evidence, in a civil suit arising from the injury. TEX. PROP. CODE ANN. § 55.008(c) (Vernon Supp. 2006).

1. Physicians' Liens

The Texas Hospital Lien Statute provides that certain physician charges may be *added* to a hospital lien. In 2001, the Texas Legislature amended the Texas Hospital Lien Statute to permit hospitals to include, in the hospital's lien, the charges of physicians who provided emergency hospital care to the patient. Emergency hospital care is defined as:

> health care services provided in a hospital to evaluate, stabilize, and treat a serious medical problem of recent onset or severity, including severe pain that would lead a prudent layperson possessing average knowledge of medicine and health to believe that the condition, illness, or injury is of such a nature that failure to obtain immediate medical care would in all reasonable probability:
>
> (1) seriously jeopardize the patient's health;
>
> (2) seriously impair one or more bodily functions;
>
> (3) seriously harm an organ or other part of the body;
>
> (4) cause serious disfigurement; or
>
> (5) in the case of a pregnant woman, seriously jeopardize the fetus.

TEX. PROP. CODE ANN. § 55.004(a) (Vernon Supp. 2006). Accordingly, only certain care rendered by a physician may be included as a part of the hospital's lien. The hospital lien may include the physician's reasonable and necessary charges for emergency health care services provided to the injured person during the person's first seven days at the hospital. TEX. PROP. CODE ANN. § 55.004(c) (Vernon Supp. 2006). A physician must request that the hospital include these charges in their lien and act on the physician's behalf in securing and discharging the lien, as only the hospital may assert a lien to recover these charges. TEX. PROP. CODE ANN. § 55.004(c)(Vernon Supp. 2006).

The Texas Hospital Lien Statute also includes one provision which permits some individual physicians to file, on his/her own behalf, written notice of a lien which will attach to a plaintiff's personal injury cause of action. In 2003, the Texas Legislature created a provision permitting physicians who practice for and who are employed by Texas institutes of higher education, or the physician's employing institution, to secure and enforce their own lien in the same manner as that set forth for hospitals. TEX. PROP. CODE ANN. § 55.004(f)(Vernon Supp. 2006). Institutes of higher education include any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education. *See* TEX. EDUC. CODE ANN. § 61.003(8) (Vernon 2005). However, these physicians may not file a lien if the hospital already includes the physician's charges in the hospital's lien. TEX. PROP. CODE ANN. § 55.004(f) (Vernon Supp. 2006). In addition, physicians are expressly prohibited from filing a lien if the physician accepts or could accept insurance benefits or payments on behalf of the patient or if the physician could recover from the patient's private medical

indemnity plan. TEX. PROP. CODE ANN. § 55.004(d)(2-3) (Vernon Supp. 2006) (emphasis added).

2. Emergency Medical Services Providers

The Texas Hospital Lien Statute includes a third and final provision which permits an emergency medical services provider ("EMSP") to recover limited charges expended to care for an accident victim. TEX. PROP. CODE ANN. § 55.002(c) (Vernon Supp. 2006). The provision permits ambulance and helicopter services to recover up to $1,000.00 for emergency medical services provided to the injured individual during the 72 hours following the accident which caused the injuries. TEX. PROP. CODE ANN. § 55.004(f) (Vernon Supp. 2006). However, this provision is limited to emergency medical services provided in a county with a population of 575,000 or less. TEX. PROP. CODE ANN. § 55.002(c) (Vernon Supp. 2006). Essentially, the provision applies to every county in the State of Texas except Harris, Dallas, Tarrant, Bexar, Hidalgo and Travis.

Like the hospital lien, the EMSP lien attaches to causes of action, judgments, and proceeds of settlements. TEX. PROP. CODE ANN. § 55.003(a) (Vernon Supp. 2006). The EMSP lien must also be properly noticed and filed before the injured party receives a payment for his/her injuries and only applies if the EMSP renders emergency services within 72 hours of the event causing the patient's injuries. TEX. PROP. CODE ANN. §§ 55.005(a), 55.002(a)(c) (Vernon Supp. 2006). These charges must not exceed a reasonable and regular rate. TEX. PROP. CODE ANN. § 55.004(g)(1) (Vernon Supp. 2006). Much like a physician, an EMSP is also prohibited from filing a lien if the EMSP accepts or could accept any insurance benefits or payments for the services or if the EMSP could recover from the patient's private medical indemnity plan. TEX. PROP. CODE ANN. § 55.004(g)(2-3) (Vernon Supp. 2006).

3. Potential Remaining Liability for Defendant & Insurance Carrier

The Hospital Lien Statute specifically addresses the validity of a release of a cause of action or judgment. A release of a hospital lien is not valid unless:

> (1) the charges of the hospital or emergency medical services provider claiming the lien were paid in full *before* execution and delivery of the release;
>
> (2) the charges of the hospital or emergency medical services provider claiming the lien were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or
>
> (3) the hospital or emergency medical services provider claiming the lien is a party to the release.

TEX. PROP. CODE ANN. § 55.007 (a) (Vernon Supp. 2006). As such, without the satisfaction of hospital liens, no settlement would be valid. *See id*; *see also Daughters of Charity Health Services of Waco,* 151 S.W.3d at 670-71 (dissenting opinion citing TEX. PROP. CODE ANN. § 55.007(a)). In addition, when a hospital or emergency medical services provider lien attaches to a judgment in a medical malpractice suit, the judgment remains in effect until the hospital or emergency medical services provider is paid in full or to the extent set out in the judgment. TEX. PROP. CODE ANN. § 55.007(b) (Vernon Supp. 2006).

As previously noted, Texas case law has established that the Hospital Lien Statute creates a separate cause of action independent of the patient's obligation to pay and that this cause of action begins to accrue when the judgment or settlement proceeds are actually paid. *See Baylor Univ. Med. Ctr. v. Borders*, 581 S.W.2d 731, 732 (Tex. Civ. App.–Dallas 1979, writ ref'd). Accordingly, the statute of limitations on a hospital's lien does not begin to run until the judgment or settlement proceeds are paid. The statute of limitations is four years from payment of settlement or judgment. *See id*. at 732-34.

Based upon the statute, it is clearly implied that the action may be brought against not only the patient who incurred the services and received the settlement funds, but also the defendant who failed to obtain a valid release.

Further, case law suggests that the hospital's lien attaches to a patient's entire cause of action for damages arising from an injury for which the injured patient is admitted to the hospital, regardless of whether the ultimate judgment or settlement allocates funds expressly for medical expenses. *See Hermann Hospital v. Martinez*, 990 S.W.2d 476, 481 (Tex. App.–Houston, 1999, pet. denied)(finding that a hospital lien was enforceable against a judgement awarding a minor patient damages for injuries sustained in a car accident even thought the patient's past medical expenses were not included in the monetary damages awarded to the patient). Accordingly, Texas law also implies that neither patients nor defendants in a lawsuit may avoid hospital liens by expressly allocating settlement funds for compensation for a patient's other injuries, i.e. lost wages, physical pain and suffering, or lost wages.

An unanswered question is what liability must be established by the hospital to recover for the amount of the lien after a settlement. Old case law suggests that the mere fact of "settlement" by the insured establishes liability of the defendant. *See Republic Ins. Co. v. Shotwell*, 407 S.W.2d 864, 866 (Tex. Civ. App.–Amarillo 1966, writ ref'd n.r.e.) (stating that the insurer must have been responsible to the hospital because of the acts of the tortfeasor or they would not have paid for such actions). Almost every settlement agreement includes a provision that the settlement is not an admission of liability, and settlement decisions are made for numerous other reasons besides just liability. Therefore, it is questionable whether this rationale will continue or whether the hospital will still have the establish the underlying liability of the defendant.

B. Texas Rehabilitation Commission

The Texas Rehabilitation Commission ["TRC"] is automatically subrogated to a patient's right of recovery for personal injuries from a third-party tortfeasor, personal insurance or any other source of payment. TEX. HUM. RES. CODE ANN. § 111.059 (Vernon 2001). The right of subrogation is limited to the cost of the services provided. TEX. HUM. RES. CODE ANN. § 111.059(b) (Vernon 2001). The Commissioner of the TRC has the right to create rules to enforce the TRC's subrogation rights and also has the right to waive the TRC's right to subrogation if he believes enforcement would defeat the purpose of rehabilitation. TEX. HUM. RES. CODE ANN. § 111.059(c)(d) (Vernon 2001).

C. Texas Workers' Compensation Liens

Under Chapter 417 of the Texas Labor Code, a workers' compensation insurance carrier is subrogated to the rights of the injured employee beneficiary and may seek recovery from a third-party tortfeasor who caused the employee's injuries. TEX. LAB. CODE § 417.001(b) (Vernon 2006). Unlike other insurers, a workers' compensation insurance carrier's subrogation rights are defined and limited by statute. *See Autry v. Dearman*, 933 S.W.2d 182, 189 (Tex. App.–Houston[14th Dist.] 1996, writ denied). The workers' compensation carrier has no equitable right of subrogation. *See id.* However, although other parties cannot contractually change an insurance carrier's rights, an insurance carrier may change its own subrogation rights by contract. *See, e.g., Texas Emp. Ins. Ass'n v. Grimes*, 269 S.W.2d 332, 334-35 (Tex. 1954); *Jackson v. Hanover Ins. Co.*, 389 S.W.2d 328, 329 (Tex. Civ. App.–Waco 1965, no writ); *see also Texas Workers' Compensation Ins. Fac. v. Aetna Cas. & Sur. Co.*, 994 S.W.2d 923, 926 (Tex. App.–Houston [1st Dist.] 1999, no writ).

The Texas Labor Code grants subrogation rights to private workers' compensation carriers and to the Subsequent Injury Fund. TEX. LAB. CODE § 417.001 (b)(c) (Vernon 2006). The Subsequent Injury Fund is a state fund used to reimburse workers' compensation insurance carriers who make overpayments in certain circumstances and to facilitate the hiring of previously injured workers by paying benefits when the worker endures a second work-related injury which results in total disability. TEX. LAB. CODE §§ 410.032, 410.205, 408.162 (Vernon 2006).

The insurance carrier may only seek recovery for the total amount of benefits it paid or assumed on behalf of the injured employee. TEX. LAB. CODE § 417.001(b) (Vernon 2006). Additionally, the insurance carrier's recovery will be reduced if the court reduces the injured employee's recovery based on the employer's percentage of responsibility for the injuries. TEX. LAB. CODE § 417.001(b) (Vernon 2006); *see also* TEX. CIV. PRAC & REM. CODE § 33.003 (Vernon 2005).

For example, if an employee is injured on the job and is subsequently injured again by the physician who is

treating the employee for his job-related injuries, a jury might determine that the employer is 50 percent responsible and the physician is 50 percent responsible for the employee's injuries. While the trial is pending, the employer's workers' compensation insurance carrier pays all of the injured employee's medical expenses. If the jury renders a verdict against the defendant physician for $50,000, the court may reduce the insurance carrier's subrogation interest by 50 percent, such that the defendant physician is not required to compensate the insurance carrier for the amount of liability of the employer.

The workers' compensation carrier's subrogation interest entitles it to stand in the shoes of the injured employee and sue the third-party tortfeasor. TEX. LAB. CODE § 417.001(b) (Vernon 2006). If the injured employee's recovery is in excess of the insurance carrier's subrogation interest, the insurance carrier must reimburse itself and pay costs incurred from the recovery. TEX. LAB. CODE § 417.001(b)(1) (Vernon 2006). Then, the insurance carrier must pay the remaining recovery to the injured employee or his legal beneficiary. TEX. LAB. CODE § 417.001(b)(2) (Vernon 2006).

It important to note that the insurance carrier's subrogation interest is not limited to the amount of benefits already paid to or on behalf of the injured employee. *See* TEX. LAB. CODE § 417.003 (Vernon 2006). The insurance carrier may treat any recovery, in excess of the amount of benefits already paid, as an advance against future workers' compensation benefits that the injured employee is entitled to receive. TEX. LAB. CODE § 417.002(b) (Vernon 1996); *see Charter Oak Fire Ins. Co. v. Currie*, 670 S.W.2d 368, 370-71 (Tex. App. Dallas 1984, no writ); *Hartford Acc. & Indem. Co. v. Buckland*, 882 S.W.2d 440, 445 (Tex. App.–Dallas 1994, writ denied). However, the insurance carrier may not recover prejudgment interest on benefits it paid. *See Mosely v. State Dept. of Highways & Public Transp.*, 748 S.W.2d 226, 227 (Tex. 1988).

The insurance carrier must pay the injured employee's attorney for the attorney's fees incurred in the recovery of the benefits from the third-party tortfeasor. TEX. LAB. CODE § 417.003 (Vernon 2006). The attorney and the insurance carrier may contractually agree on a fee for these services, or in the absence of an agreement, the court will award the attorney a reasonable fee for recovery of the insurance carrier's interests, which may not exceed one-third of the insurance carrier's recovery. TEX. LAB. CODE § 417.003(a)(1) (Vernon 2006). The court may also order the insurance carrier to pay the attorney a proportionate share of the expenses incurred in the recovery. TEX. LAB. CODE § 417.003(a)(2) (Vernon 2006). If the insurance carrier hires its own attorney to collect the benefits, the court considers the individual services rendered to the insurance carrier by the injured employee's attorney and the insurance carrier's attorney and apportions an award of attorney's fees between the two attorneys. TEX. LAB. CODE § 417.003(c) (Vernon 2006). When determining the amount of attorney's fees, the court only considers the amount of benefits that have already been paid by the insurance carrier. TEX. LAB. CODE § 417.003(d) (Vernon 2006).

If a third-party tortfeasor and his insurer settle with the injured employee without satisfying the interests of the workers' compensation carrier, the third-party tortfeasor and his insurer are jointly and severally liable for all benefits paid by the carrier. *See Autry*, 933 S.W.2d at 189. And, this liability is extended to the attorney representing the employee, who benefits from the settlement. *See Prewitt & Sampson v. City of Dallas*, 713 S.W.2d 720, 722 (Tex. App.–Dallas 1986, writ ref'd n.r.e.).

Although no specific statute of limitations exists for a workers' compensation carrier to bring a subrogation claim, because the carrier stands in the shoes of the injured employee, carriers are subject to the same general statute of limitations applied to the injured employees. *See Guiilot v. Hix*, 838 S.W.2d 230, 233 (Tex. 1992), reh'g of cause overruled (Nov. 11, 1992) (holding that a carrier's subrogation rights accrue at the time the beneficiary is injured by the third party tortfeasor, and if the beneficiary timely brings a cause of action against the tortfeasor, the carrier may intervene at any time); *Harris County v. Carr*, 11 S.W.3d 342, 343-44 (Tex. App.–Houston [1st] 1999), reh'g of cause overruled (Feb. 18, 2000), Rule 53.7(f) Motion dism'd (May 4, 2000). Consequently, a carrier's subrogation cause of action is covered by the two-year personal injury statute of limitations. *See id.* This statute of limitations applies to both private insurance carriers and self-insured government entities. *See, e.g., Harris County,* 11 S.W.3d at 344. While government entities are generally exempt from the personal injury statute of limitations under Texas Civil Practice & Remedies Code section 16.061, because the claim actually belongs to the injured employee,

the personal injury limitation applies to the government entity as well. *See id.*

III. Federal Liens

The federal government has enacted several programs to provide medical care for those who would otherwise be unable to pay for them. Statutes and regulations address the right of the federal government to assert liens and subrogation rights to recover the expenditures for medical services in these instances. The primary provider of these services which are at issue in medical malpractice and personal injury lawsuits is Medicare. Resolving Medicare liens is often cumbersome and lengthy. Medicare has rights far in excess of most subrogation claims and liens, so the necessity for protection is even greater. The following discusses federal liens and the rules and regulations for asserting and satisfying them.

A. Federal Medical Care Recovery Act

In 1962 Congress created the Federal Medical Care Recovery Act [hereinafter "MCRA"] to enable the government to recover money it expends for medical care to persons injured by tortious third parties. *See In re Dow Corning Corp.*, 250 B.R. 298, 324-25 (Bankr. E.D. Mich. 2000). The MCRA is a catch-all statute which permits the federal government to recoup money that it pays for medical expenses in any circumstance where the government has provided that service, such as in military hospitals. *See* 42 U.S.C.A. § 2651 (2003). This also includes care and treatment rendered by the Veteran's Administration. The government has the right to join or intervene in any action instituted by the injured person against the tortious third party and/or the third party's insurer. 42 U.S.C.A. § 2651(d) (2003). If the injured person does not file an action within six months from the first day in which the government provided care and treatment for the person's injury which resulted from a tortious act, the government has the right to initiate legal action. 42 U.S.C.A. § 2651(d) (2003). The government may begin legal proceedings in its own name or in conjunction with the injured party. 42 U.S.C.A. § 2651(d) (2003). Thus, even if a potential plaintiff does not sue an alleged tortfeasor, the government may file a personal injury lawsuit in order to recover the medical expenses it subsidized.

The statute of limitations on the federal government's ability to recover medical expenses from a tortious third party is three years and does not begin to run until a responsible government official has actual knowledge, or should have known, that the medical expenses it paid may have been a result of the third party's tortious action. 28 U.S.C.A. § 2415(b) (2003); *see United States v. Angel*, 470 F.Supp. 934, 935 (E.D. Tenn. 1979). Of further interest is that the United States' right to recover the cost of medical services provided **are not** released because of settlement and release of the tortfeasor. *See Holbrook v. Anderson Corp.*, 996 F.2d 1339, 1341 (1st Cir. 1993) (emphasis added).

B. Medicare

Established in 1965 as Title XVIII of the Social Security Act, Medicare is a government social insurance program which provides health care to senior adults and certain other individuals without consideration of the recipient's assets or income. 42 U.S.C.A. § 402, 423 (2003 & Supp. 2006); 42 U.S.C.A. § 426 (2003 & Supp. 2006); see also 42 U.S.C.A. § 1395 *et. seq.* (2003 & Supp. 2006). Medicare has very strong rights with respect to reimbursement of the costs of benefits it provides to individuals who may have a negligence claim against a third-party. Under the Medicare Secondary Payer Act ["MSPA"], Medicare is expressly prohibited from paying for the medical expenses of a person whose medical expenses have been paid, or can reasonably be expected to be paid, by an automobile or liability insurance policy or self-insured plan. 42 U.S.C.A. §1395(y)(b)(2)(A) (Supp. 2006); 42 C.F.R. § 411.20 (2005). Accordingly, Medicare takes the position that it generally can not pay for the medical expenses of a person who is injured by a tortious third-party and recovery is expected or reasonably expected.

The statute defines "self-insured plan" as an entity that engages in business, trade, or profession which carries its own risk, whether by a failure to obtain insurance or otherwise. 42 U.S.C.A. §1395(y)(2)(A)(ii) (Supp. 2006). This is a more recent amendment to the Act broadening the definition of a "self-insured plan." The definition would seem to give rights to Medicare to recover against any tortfeasor.

Despite this general prohibition, the MSPA allows Medicare to *conditionally* pay for an injured party's medical expenses where payment of medical expenses by a liability policy or self-insured plan is not reasonably expected to be made promptly, but the payments are conditioned on reimbursement. 42 U.S.C.A. § 1395y(b)(2)(B)(i) (Supp. 2006). When Medicare makes a conditional payment under this provision, it is automatically subrogated to any right of the injured person to recover the medical expenses Medicare paid from any third-party payers, including a defendant and his liability insurer in a personal injury suit. 42 C.F.R. 411.24(i)(1) (2005); 42 C.F.R. 411.26 (2005); *See, e.g.*, *United States v. Sonowski*, 822 F.Supp. 570, 570-71 (W.D. Wis. 1993).

Medicare has the right to intervene in a personal injury lawsuit or join an underlying action to recover conditional payments. 42 C.F.R. 411.26(a) (2005). Medicare also has a direct right of action to recover from any entity responsible for making a primary payment. 42 C.F.R. 411.24(e) (2005).

In order to facilitate this, Medicare recipients who initiate a personal injury lawsuit for injuries for which Medicare provided treatment for are required to notify Medicare of the litigation. 42 C.F.R. 411.24(b)(d)(e) (2005); 42 C.F.R. 411.26 (2005). Once the Medicare recipient settles his personal injury lawsuit, he is required to reimburse Medicare within 60 days of the settlement. 42 C.F.R. 411.24(h) (2005).

Not only does Medicare have the right to recover when Medicare pays for a plaintiff's medical expenses, Medicare has the right to assert a "super lien" against a plaintiff's personal injury cause of action. *See United States v. Geier*, 816 F.Supp. 1332, 1334 (W.D. Wisconsin 1993) (stating that the statutory language of 42 U.S.C.A. §1395y(b) establishes that "the United States' right of reimbursement is paramount to all other subrogated parties' claims"). Medicare's right to recover the money it expended on the plaintiff's medical expenses is superior to the rights of any other lien holder or claimant *See id.* If the government is forced to take legal action to recover conditional medical expenses it paid, it has the right to collect double damages. 42 U.S.C.A. §1395y(b)(2)(B)(iii) (Supp. 2006). Accordingly, the resolution of a Medicare lien should be taken very seriously.

Like federal claims under the MCRA, the government must initiate an action to recover conditional medical expense payments under the MSPA within three years from the first day that the injured person's medical expenses were furnished. 42 U.S.C.A. § 1395y(b)(2)(B)(vi)(Supp. 2006). The only exception to this statute of limitations exists in circumstances involving Medicare recovery when a defendant's liability insurer has a claims filing deadline. When these circumstance arise, the federal government must file a claim for recovery within one year from the date it learns of the claim against the alleged tortfeasor. 42 C.F.R. § 411.24(f)(1-2) (2005).

The threat of liability for defendants and their insurers, despite a careful settlement agreement, for the obligations of a plaintiff who fails to satisfy his Medicare liens is more ominous than the threat of liability from Texas statutory liens. When a settlement occurs, if Medicare is not reimbursed as required, the defendant or his/her insurer must reimburse Medicare even though it has already reimbursed the plaintiff. 42 C.F.R. 411.24(i)(1) (2005). This is also true if a defendant or insurer makes a payment to an entity other than Medicare when the defendant/insurer is aware or should be aware that Medicare has made conditional payments. 42 C.F.R. 411.24(i)(2) (2005). This right of recovery is not limited to merely a defendant and his/her insurer. Medicare also has a right of recovery against any entity, including a beneficiary, provider, supplier, physician, attorney, State agency or private insurer who has received a third-party payment. 42 C.F.R. 411.24(g) (2005). A judgment or settlement received by a Medicare recipient is considered a third-party payment. 42 C.F.R. 411.26(a) (2005). Accordingly, it appears Medicare may pursue anyone who has received settlement funds paid to satisfy a judgment.

There is at least one case which addresses Medicare's right of recovery and reimbursement from defendants and their insurers in a personal injury lawsuit after the case is settled. The *In re Dow Corning Corporation* case involved a claim by the federal government for reimbursement for the costs of medical care that Medicare provided as a result of injuries allegedly caused by breast implants manufactured by defendant Dow Corning Corporation. 250 B.R. 298, 307 (Bankr. E.D. Mich. 2000). The defendants settled the class action lawsuit, and the government ultimately went after the defendants for reimbursement. *See id.* at 307-310.

In a voluminous opinion, in which the Bankruptcy court chronicles the history and construction of both the MCRA and MSPA, the court determined that in order to recover payments under the MSPA, the government must "prove that the third party against whom it seeks recovery is required or responsible to make payments with respect to the services provided." *Id.* at 349. More significantly, the court found that when liability is in dispute, the defendant's liability insurer cannot be required or responsible to make payments to the government for Medicare under the MSPA unless the government has established that the defendant actually committed a tort against the injured party. *See id*. at 340. Furthermore, the court stated that an agreement to settle is not an admission of liability and does not make the defendant responsible to pay the plaintiff's medicare expenses. *See id*. at 340-341.

Although the court's analysis in *In re Dow Corning Corp*. is hardly settled law, it makes a powerful argument that the statutory construction of the MSPA does not allow the government to seek "automatic" reimbursement for Medicare expenses from defendants and their insurers when the parties settle a case. The court did note that the government could seek reimbursement from a defendant and his liability insurer for unsatisfied Medicare liens if the defendant was found liable in a judgment. *See id.* at 340; *See generally, Waters v. Farmers Texas County Mut. Ins.* Co., 9 F.3d 397 (5th Cir. 1993); *Zinman v. Shalala*, 67 F.3d 841 (9th Cir. 1995); *Unites States v. Sonowski*, 822 F.Supp. 570 (W.D. Wis. 1993).

In some instances, a Medicare lien may be so large as to subdue settlement talks, especially in a case of questionable liability where fear exists that Medicare will seek full recovery of benefits despite the liability issues. Many plaintiff attorneys attempt to address this issue by negotiating a reduction of the claim. A reduction of the lien for attorney's fees and expenses is available. 42 C.F.R. 411.37 (2005). While the statute does not set forth authority for Medicare to reduce its lien beyond reasonable attorney's fees and expenses, the federal government has a right to waive some or all of its recovery if it "is in the best interests of the program" or if recovery would be against "equity and good conscience." 42 U.S.C.A. § 1395y (b)(2)(B)(v) (Supp. 2006); 42 U.S.C.A. § 1395gg(c) (2003 & Supp. 2006); 42 C.F.R. § 405.358 (2005); *see also Fanning v. United States*, 346 F.3d 386, 401 (3d Cir. 2003).

C. Medicaid

Medicaid, established in 1965 as Title XIX of the Social Security Act, is a government program which provides need-based medical assistance to the elderly, the disabled, and families with dependent children who are unable to afford necessary medical costs. 42 U.S.C.A. § 1396 *et. seq.* (2003 & Supp. 2006). Although Medicaid is a federal program, because it is administered through the states, the rules for repayment of medical benefits vary from state to state. In Texas, section 32.033 of the Texas Human Resources Code outlines the State's rights to reimbursement for money expended on medical expenses for Medicaid recipients. *See* TEX. HUM. RES. CODE ANN. § 32.033 (Vernon 2001).

In Texas, the Health and Human Services Commission (formerly the Texas Department of Health, hereinafter "THHSC") is automatically granted an assignment of a Medicaid recipient's right of recovery from a personal injury cause of action when the recipient fills out a Medicaid application. TEX. HUM. RES. CODE ANN. § 32.033(a) (Vernon 2001); *see also*, TEX. HEALTH & SAFETY CODE ANN. §12.036 (Vernon 2001) (stating that when the Department of Health provides health services to a person it is subrogated to their right to recover from a third-party for personal injuries); 1 TEX. ADMIN. CODE § 374.6 (2005) (Texas Health and Human Services Commission, Temporary Assistance for Needy Families). Just like the federal government with respect to Medicare recovery, the THHSC has the right to intervene or join in a personal injury suit filed by a Medicaid recipient, or the THHSC can file a lawsuit itself to recover its expenses. *Texas Dept. Health v. Buckner*, 950 S.W.2d 216, 218-19 (Tex. App.–Fort Worth 1997, pet. denied); TEX. HUM. RES. CODE Ann. § 32.033(d) (Vernon 2001). Thus, the THHSC has the ability to pursue defendants and their insurers in a personal injury lawsuit for medical expenses paid by Medicaid.

Medicaid recipients are required to inform the THHSC of any unsettled tort claims which might affect their medical needs, of any private insurance that might become available, and of any injury which requires medical attention that was caused by the negligence of a third-party. TEX. HUM. RES. CODE ANN. § 32.033(b) (Vernon 2001). The Medicaid recipient must inform the

THHSC within 60 days of the date the recipient learns that he may have insurance coverage or a cause of action. TEX. HUM. RES. CODE ANN. § 32.033(b) (Vernon 2001). Medicaid recipients who do not disclose this information are subject to criminal penalties and discontinuation of Medicaid benefits. TEX. HUM. RES. CODE ANN § 32.033(b) (Vernon 2001);1 TEX. ADMIN. CODE § 374.7 (2005) (Texas Health and Human Services Commission, Temporary Assistance for Needy Families). As a result, the THHSC generally receives information on defendants and their insurers in personal injury lawsuits filed by Medicaid and reserves the right to pursue them to recover the plaintiff's medical expenses, if necessary.

Under Texas law, Medicaid also has an independent cause of action for reimbursement for medical expenses that it pays on behalf of a plaintiff against defendants and their insurers in the plaintiff's personal injury lawsuit for the same injuries that gave rise to the expenses. *See* TEX. HUM RES. COD. Ann. § 32.033(d) (Vernon 2001); *Tex. Dept. Health v. Buckner*, 950 S.W.2d 216, 219 (Tex. App.–Fort Worth 1997, pet. denied). However, unlike Medicare, Medicaid cannot seek double recovery of its claim. Medicaid's recovery is limited to the amount of the cost of the medical care services paid by Medicaid. TEX. HUM RESOURCE COD. Ann. § 32.033(e) (Vernon 2001). In Texas, Medicaid liens may also be waived if recovery of the lien would work an undue hardship on the beneficiary or defeat the purposes of the program. TEX. HUM RESOURCE COD. Ann. § 32.033(f) (Vernon 2001)(allowing waiver if recovery "would tend to defeat the purpose of public assistance."

On May 1, 2006, the United States Supreme Court handed down a new opinion regarding a state government's ability to recover funds from a Medicaid recipient from the recipient's settlement of a personal injury lawsuit. See *Arkansas Dept. of Health and Human Services v. Ahlborn*, 126 S. Ct. 1752(2006). In *Arkansas Dept. of Health and Human Services v. Ahlborn*, the Supreme Court held that a Medicaid lien only applies to the portion of a plaintiff's recovery on a personal injury claim that stems from past medical expenses. *See id.* at 1758. While the impact of this case on Texas law is untested, it is possible that in certain circumstance the THHSC may be limited to a recovery that is something less than the amount of the cost of the medical care services paid by Medicaid, as currently allowed by Texas statute. *See* TEX. HUM RESOURCE COD. Ann. § 32.033(e) (Vernon 2001).

In *Ahlborn*, the plaintiff suffered severe and permanent injuries resulting from a car accident. *See id.* at 1757. Because she was unable to pay for her own medical care for her injuries, the Arkansas Department of Health Services (ADHS) paid the plaintiff's health care providers $215, 645.30 under the state of Arkansas' Medicaid program. *See id.* Pursuant to Arkansas state law, ADHS maintained that it had a claim for reimbursement for these expenses from "any settlement, judgment, or award obtained by the plaintiff from "a third party who may be liable for her injuries." *See id.* After the plaintiff filed suit against the third party tortfeasors who allegedly caused her injuries, ADHS intervened to assert a lien on the proceeds of any third party recovery by plaintiff. *See id.* The case was settled out of court several years later for $550,000.00. *See id.*

As in many settlements, the parties did not allocate the settlement between categories of damages. *See id.* ADHS did not participate or ask to participate in the settlement negotiations and subsequently asserted a lien against the settlement proceeds for the entire $215, 645.30 paid by Medicaid for plaintiff's health care. *See id.* Plaintiff filed suit in federal court requesting a declaration that the lien violated Medicaid laws because its satisfaction would require depletion of compensation for injuries other than past medical expenses. *See id.*

Plaintiff and ADHS stipulated that Plaintiff's entire claim was valued at more than three million dollars, that the case was settled for approximately one-sixth of its value, and that if plaintiff's construction of law was correct, ADHS would only be entitled to one-sixth of the amount of medical expenses paid, the portion of the settlement that was allocated to past medical expenses. *See id* at 1758. In a unanimous opinion, the Supreme court ruled in favor of Plaintiff, holding that, while a state can require that a Medicaid recipient assign the state Medicaid program the right to any payments that may constitute reimbursement for medical costs, application of the anti-lien provision of federal Medicaid law precluded the state of Arkansas from placing a lien on the plaintiff's recovery that were related to damages other than medical costs. *See id* at 1763. Accordingly, the Supreme Court reasoned that, since

Plaintiff settled for one-sixth the value of her entire claim, ADHS was entitled to one-sixth of the amount expended on Plaintiff's medical care, which came to $35,581,47. *See id* at 1767.

Courts around the country are just beginning efforts to apply the Supreme Court's decision in *Ahlborn.* Because the Supreme Court did not limit its rationale to the Arkansas statutes at issue, it is quite possible that *Ahlborn* will be applied in other states, including Texas, to limit Medicaid liens. A practical effect of *Ahlborn* in Texas is that plaintiffs, defendants, and defendants' insurers who settle a case for less than its actual value may use *Ahlborn* as leverage to negotiate a percent reduction of a lien asserted by Medicaid that is proportional to the percentage the settlement amount bears with respect to the value of the plaintiff's entire claim.

Ahlborn raises several unanswered questions. These include whether the Supreme Court's holding will have any impact on jury verdicts where the jury awards damages for medical expenses that are less than an existing Medicaid lien and how it will be applied in more complex cases where some parties settle and other parties are subject to a judgment. It is also unknown whether the Supreme Court's reasoning could be extended to limit Medicare liens as well. This is a particularly important issue given that, as previously discussed, Medicare has the right to double recovery of medical expenses in certain cases.

D. Texas Department of Aging and Disability Services

The Texas Health and Human Services Commission administers some of its Medicaid funds through the Texas Department of Aging and Disability Services ("TDADS"). This department pays for some portions of expenses incurred by Medicaid recipients for nursing home care. Consequently, like THHSC, TDADS is automatically granted an assignment of a Medicaid recipient's right of recovery from a personal injury cause of action when the recipient fills out a Medicaid application. *See* TEX. HUM. RES. CODE ANN. § 32.033(a) (Vernon 2001); *see also*, TEX. HEALTH & SAFETY CODE ANN. §12.036 (Vernon 2001) (stating that when the Department of Health provides health services to a person it is subrogated to their right to recover from a third party for personal injuries). It follows that TDADS also has the ability to pursue defendants and their insurers in a personal injury lawsuit for medical expenses paid by Medicaid. Because plaintiff Medicaid recipients are required to inform the TDADS of any unsettled tort claims which might affect their medical needs, of any private insurance that might become available, and of any injury which requires medical attention that was caused by the negligence of a third-party, TDADS generally receives information on defendants and their insurers in personal injury lawsuits filed by Medicaid and reserves the right to pursue them to recover the plaintiff's medical expenses, if necessary. TEX. HUM. RES. CODE ANN. § 32.033(b) (Vernon 2001).

IV. Common Law Subrogation Claims

When private insurance companies, including a plaintiff's private health insurers, like Cigna, Aetna, or Humana, pay for the plaintiff's medical expenses resulting from injuries to the plaintiff caused by a third-party tortfeasor, the insurance company may have a right of subrogation against the third-party tortfeasor. *See F.D.I.C. v. Holland Amer. Ins. Co.*, 759 S.W.2d 786, 787 (Tex. App.–El Paso 1988, writ denied) (stating that a party has a subrogation right against a tortfeasor because the party paid a legal obligation that should have been paid by the debtor). The insurance company has the right to "stand in the shoes" of the injured plaintiff and try to recover the money the insurance company paid on behalf of the plaintiff. *See McBroome-Bennett Plumbing, Inc. v. Villa France Inc*., 515 S.W.2d 32, 36 (Tex. App.–Dallas 1974, writ ref. n.r.e.); *Stafford Metal Works, Inc. v. Cook Paint & Var. Co.*, 418 F.Supp. 56, 58 (N.D. Tex. 1976).

In Texas, an insurance company may have both an equitable and contractual right of subrogation. *See Thoreson v. Thoreson*, 431 S.W.2d 341, 347 (Tex. 1968) (stating that insurers have an equitable right of subrogation even if no right exists in the insurance contract); *See Foremost County Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754, 760-762 (5th Cir. [Tex.] 1990) (stating that most insurance policies create a contractual subrogation right). If the insurance company has contractual subrogation rights, the insurance company's rights will be outlined in the insurance policy and may vary from provider to provider. *Foremost County*, 897 F.2d at 760-62.

Regardless of the source of the insurance company's subrogation rights, these rights are generally destroyed when the insured plaintiff settles with the tortfeasor or releases him from liability, because the insurer has no greater rights against the tortfeasor than the insured plaintiff. *See Hollen v. State Farm Auto. Ins. Co.*, 551 S.W.2d 46, 49 (Tex. 1977). However, if the defendant has notice of the plaintiff insurer's subrogation rights and settles with the plaintiff, the insurance company may still assert its subrogation rights and seek recovery from the defendant and his liability insurer. *See Wichita City Lines v. Puckett*, 295 S.W.2d 894, 899-900 (Tex. 1956). The question then becomes what "notice" is sufficient to enable an insurer to assert a claim against a defendant who has settled a lawsuit. The insurer has the burden of establishing that the defendant had notice of the subrogation interest. *See Cloyd v. Champion Home Builders Co.*, 615 S.W.2d 269, 271 (Tex. Civ. App.–Dallas 1981, writ ref'd n.r.e) (holding that the defendant was entitled to summary judgment in claim filed by carrier where release was not challenged by proper evidence of notice of subrogation interest). Where a defendant receives actual notice of an insurer's subrogation right, a settlement with the insured does not extinguish the subrogation claim. *See Landsdowne-Moody Co. v. St. Clair*, 613 S.W.2d 792, 793 (Tex. Civ. App.–Houston [14th Dist.] 1981, no writ) (holding that notice of claim served in person on defendant one month before release was entered was sufficient to defeat a motion summary judgment on the basis of the release filed by the defendant).

Defendants and their liability insurers must, therefore, be cautious when settling cases if they receive a letter from the plaintiff's insurer asserting subrogation rights or, in some manner, provides the defendant with actual notice of a subrogation interest. If a plaintiff's insurer has a noticed subrogation interest, the insurer should be included in the settlement, and the defendant should be ensure that the subrogation interest is resolved and satisfied by virtue of the settlement.

V. Resolution of Liens

A. Settlement Agreements

Because defendants and their insurers in medical malpractice lawsuits may be held responsible for the obligations of a plaintiff who fails to satisfy certain state and federal liens, it is critical that settlement agreements and final judgments include provisions which address the resolution of the plaintiff's liens. The most common protection included in a settlement agreement is an indemnification clause, in which the plaintiff and/or his attorney agree to hold the defendant and his insurer harmless and defend them if any of the plaintiff's lienholders pursue the defendant and his insurer for satisfaction of liens. Unfortunately, regardless of the size of the settlement, the funds are generally completely exhausted soon after settlement. Therefore, even with indemnification, there may be no money available to indemnify the defendant or the insurer.

Defendants should also include general terms in the settlement agreement which state that the plaintiff promises and warrants that all liens and obligations related to the cause of action have been paid or will be paid by the plaintiffs. Defendants should request a copy of releases for Medicare and Medicaid liens. Finally, if defendants know that a lien exists, defendants may issue the settlement check to both the plaintiff and the lienholder or simply issue a partial settlement check directly to the lienholder separately from the check issued to the plaintiff. Although writing a check directly to the lienholder may seem like the simplest way to protect the defendant and his insurer from liability for these expenses, plaintiff's attorneys may not always agree to this arrangement because the plaintiff may want to exercise his options to negotiate and reduce some of the liens, and, in certain circumstances, force lienholders to share in some of the plaintiff's attorneys fees for the lawsuit.

In any event, the defendant and his attorney should attempt to fully educate themselves on the plaintiff's outstanding liens and subrogation interests. A plaintiff's attorney who is doing his/her job in resolving a lien should not have any hesitation in assuring you that the lien is resolved. Otherwise, one should be skeptical as to whether these liens and interests are being resolved appropriately.

B. Investigation

A little investigation may go a long way in preventing future problems with liens or subrogation interests reappearing. Conducting written discovery on these issues or simply researching whether certain liens or subrogation

interests exist may help to head off issues related to unresolved liens.

It may be readily apparent in a case whether a valid hospital lien exists if discovery has revealed that hospital care was or was not rendered within 72 hours of the incident in question. If it appears a hospital lien exists, it is wise to research deed records under the injured person's name to determine if the lien has been filed, and then request records related to the lien from the hospital or emergency services medical provider. In particular to a hospital lien, the onus is not on the hospital to give notice of the lien, except as to filing it with the county clerk. Neither the plaintiff nor the defendant should rely on actual notice from the hospital.

In obtaining medical records, it is wise to ascertain who paid for the medical expenses. If Medicare has paid for the expenses, care should be taken to obtain as much information as possible from the plaintiff's lawyer as to the negotiations of the lien and the amount of the claim being made. This is true for any other provider paying for the expenses who are afforded statutory rights with respect to their subrogation interests.

Written discovery should be attempted to obtain information on potential liens and subrogation interests, as well as the negotiations being made on them. Since the new tort law, the amount of medical expenses in medical malpractice cases are limited to the amount of expenses paid or incurred. This, arguably, would make the amount of the liens relevant to determine what has been "paid or incurred" to satisfy these expenses. In addition, while evidence of liability insurance is not admissible at trial, a plaintiff is entitled to discover the amount of insurance available to facilitate settlement discussions and case evaluation. Under the same analysis, a defendant can argue that it should be provided all information regarding any existing liens and subrogation interests and the negotiations relating to them to facilitate settlement discussions and case evaluation.

If information is obtained up front about the liens, then the resolution of the liens can be made a part of the settlement negotiations. This will enable the defendant to know up front what is at risk and what can be done to ensure the lien or subrogation interest is satisfied.

Many plaintiff lawyers attempt to negotiate liens and subrogation interests early on in the litigation so that they know how much recovery is needed in order to satisfy the lien. Many send letters when they are investigating a claim to determine the amount of lien which may be asserted. This may lead to a whole other contested matter as to the amount of the lien, the expenses being claimed under the lien and whether or not the lienholder will accept a reduction of the lien based upon attorneys' fees and expenses to be incurred in attempting to recover on the claim. Because the lawyer for the claimant can, in some instances, be held liable for unsatisfied liens, plaintiffs' lawyers are often very careful about ensuring these liens are resolved. Accordingly, the primary worry is going to exist when the lawyer is not experienced or is not familiar with the law on subrogation interests and is not aware of his/her obligation to satisfy these liens.

As part of these early attempts, plaintiffs' lawyers will often request a reduction of the lien. They often argue the "made whole" doctrine, arguing that because of the limits on non-economic damages, a claimant will never be made whole if they are required to fully reimburse the medical lien. Many plaintiff's lawyers will request a written release of the lien. Often, obtaining these written releases requires much effort and harassment on their part.

Despite the best efforts of attorneys, defendants and insurers may remain liable for the obligations of a plaintiff who fails to satisfy his liens.