

**MAKING MONEY ON HOSPITAL AND OTHER SO  
CALLED LIENS AND ONE OTHER SECRET WEAPON**

**A. INTRODUCTION**

Every practicing trial lawyer can identify with a great liability case, large damages, a minimum limits liability policy, and a huge hospital lien. After getting over your disappointment that your recovery will be minimal, you learn the hospital will not budge off their lien, leaving your client with nothing and putting any fee you might claim in jeopardy. Bastards!!

You rack your brain to come up with a reason – something to get the hospital’s attention – declaratory judgment? Been there done that. You start thumbing through the statutes, old seminar papers, and even seek help on the TTLA Listserv. Someone says what about fraudulent liens? You grab Beck’s *CPRC Plus* and flip to Chapter 12 and there it is – liability for dealing with fraudulent liens.

This paper will discuss how to use Chapter 12 from the *Texas Civil Practices & Remedies Code* to make hospitals and others that assert liens not only play ball but pay your clients and you for being sloppy, hardheaded, stupid, and arrogant. HOWEVER, this tactic or strategy is not be used in every case; just like every insurance case does not involve bad faith, every hospital lien or other lien is not fraudulent. Overuse and routine use will discount the statute’s effectiveness and will cause too much attention, meaning the statute could be modified. So please use this tactic when necessary and when there is a legitimate basis to do so.

**B. THE STATUTE**

(5) “Secure correctional facility”

has the meaning assigned by Section 1.07, Penal Code.

*Tex. Civ. Pract. & Rem. Code Ann.* §12.001 et seq. was passed in response to members of the Republic of Texas and prison inmates filing all sorts of liens on judges, legislators, law enforcement personnel, and others who opposed them. However, the statute is broad in its language and purpose and does not exclude hospital liens or similar liens.

Portions of Chapter 12 are set out below for easy reference:

**CPRC §12.001. DEFINITIONS**

In this Chapter:

(1) “Court record” has the meaning assigned by Section 37.01, Penal Code.

(2) “Exemplary damages” has the meaning assigned by Section 41.001.

(2-a) “Filing office” has the meaning assigned by Section 9.102, Business & Commerce Code.

(2-b) “Financing statement” has the meaning assigned by Section 9.102, Business & Commerce Code.

(2-c) “Inmate” means a person housed in a secure correctional facility.

(2) “Lien” means a claim in property for the payment of a debt and includes a security interest.

(4) “Public servant” has the meaning assigned by Section 1.07, Penal Code, and includes officers and employees of the United States.

**CPRC §12.002. LIABILITY**

(a) A person may not make, present, or use a document or other record with:

(1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;

(2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01, Penal code, evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and

(3) intent to cause another person to suffer:

(A) physical injury;

(B) financial injury; or

(C) mental anguish or emotional distress.

...

(b) A person who violates Subsection (a) or (a-1) is liable to each injured person for:

(1) the greater of:

(A) \$10,000; or

(B) the actual damages caused by the violation;

(2) court costs;

(3) reasonable attorney's fees; and

(4) exemplary damages in an amount determined by the court.

(c) A person claiming a lien under Chapter 53, Property Code, is not liable under this section for the making, presentation, or use of a document or other record in connection with the assertion of the claim unless the person acts with intent to defraud.

**CPRC §12.003. CAUSE OF ACTION**

(a) the following persons may bring an action to enjoin violation of this chapter or to recover damages under this chapter:

(1) the attorney general;

(2) a district attorney;

(3) a criminal district attorney;

(4) a county attorney with felony responsibilities;

(5) a country attorney;

(6) a municipal attorney;

(7) in the case of a fraudulent judgment lien, the person against whom the judgment is rendered; and

(8) in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor, or a person who owns an interest in the real or personal property.

(b) Notwithstanding any other law, a person or a person licensed or regulated by Title 11, Insurance Code (the Texas Title Insurance Act), does not have a duty to disclose a fraudulent, as described by Section 51.901(c), Government Code, court record, document, or instrument purporting to create a lien or purporting to assert a claim on real property or an interest in real property in connection with a sale,

conveyance, mortgage, or other transfer of the real property or interest in real property.

(c) Notwithstanding any other law, a purported judgment lien or document establishing or purporting to establish a judgment lien against property in this state, that is issued or purportedly issued by a court or a purported court other than a court established under the laws of this state or the United States, is void and has no effect in the determination of any title or right to the property.

#### **CPRC §12.004. VENUE**

An action under this chapter may be brought in any district court in the county in which the recorded document is recorded or in which the real property is located.

#### **CPRC §12.005. FILING FEES**

(a) The fee for filing an action under this chapter is \$15. The plaintiff must pay the fee to the clerk of the court in which the action is filed. Except as provided by Subsection (b), the plaintiff may not be assessed any other fee, cost, charge, or expense by the clerk of the court or other public official in connection with the action.

(b) The fee for service of notice of an action under this section charged to the plaintiff may not exceed:

(1) \$20 if the notice is delivered in person; or

(c) the cost of postage if the service is by registered or certified mail.

(d) A plaintiff who is unable to pay the filing fee and fee for service of notice may file with the court an affidavit of inability to pay under the Texas Rules of Civil Procedure.

(e) If the fee imposed under Subsection (a) is less than the filing fee the court imposes for filing other similar actions and the plaintiff prevails in the action, the court may order a defendant to pay to the court the differences between the fee paid under Subsection (a) and the filing fee the court imposes for filing other similar actions.

#### **CPRC §12.006. PLAINTIFF'S COSTS**

(a) The court shall award the plaintiff the costs of bringing the action if:

(1) the plaintiff prevails; and

(2) the court finds that the defendant, at the time the defendant caused the recorded document to be recorded or filed, knew or should have known that the recorded document is fraudulent, as described by Section 51.901(c), Government Code.

(b) For purposes of this section, the costs of bringing the action include all court costs, attorney's fees, and related expenses of bringing the action, including investigative expenses.

#### **C. SOME COMMENTARY**

As an overview, the term "fraudulent" in section 12.002 is not defined. *See Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498, 507 (Tex. App. – Houston [1st Dist.] 2004, no pet.). While the party asserting a §12.002 claim has the burden of proof, that does not differ from other claims. *Aland v. Martin*, 271 S.W.3d 424, 430 (Tex. App. – Dallas 2008, no pet.) (dealing with family law lawyer who filed a lien to secure her fees). The Plaintiff *does need to show* an intent to cause injury which is *not presumed or self evident* but may be proven by circumstantial evidence. *Preston Gate*

*L.P. v. Bukaty*, 248 S.W.3d 892, 897 (Tex. App. – Dallas 2008, no pet). Because it is often a clerk or third party who actually files the lien with virtually no knowledge of the lien’s validity, these types of facts become fertile ground to be demonstrate intent to injure. Moreover, if this is the lienholder’s typical practice of routinely filing liens without due regard to the lien’s validity, accuracy, and legality, an intent to injure can be shown by circumstantial evidence.

A careful reading of the statute reveals that the lien does not have to be filed. The language in *Tex. Civ. Pract. & Rem. Code Ann* §12.002(a) uses the terms “make”, “present”, or “use a document or other record”. For example, it can be argued that an entity like Cardon, Rawlings, or Ingenix who are attempting to collect or assert a lien that is fraudulent is just as liable as the person or entity who filed it or created it. Blind acceptance or generic assertions of a lien on a personal injury recovery (personal property) likewise falls under section 12.002.

To the extent a question exists as whether a valid lien has been asserted by a hospital, ERISA Plan, or other entity, it is worthwhile to research the lien alleged. Often the term lien is used when none exists at all. See “Lies, Liens, and Loopholes”, Cooper and Perry, 15th Annual Insurance Law Institute, October 14th and 15th, 2010. This paper can be found on my website [www.Ticerlawfirm.com](http://www.Ticerlawfirm.com) under articles.

The consequences to the violator are severe: the greater of \$10,000 or actual damages, court costs, reasonable attorney’s fees, and exemplary damages. Significantly, only mechanic’s and materialman’s liens are treated differently under Chapter 12. Hospital liens and other medically related claims are not exempted from the statute.

Section 12.003(8) permits the person who has a lien asserted against them to file the lawsuit. Court costs are also available which includes attorney’s fees and *related expenses including investigative expenses*. *Tex. Civ. Pract. & Rem. Code* § 12.006 (b). Emphasis added.

In addition to the foregoing, *Tex. Gov’t Code Ann.* §51.903 provides an inexpensive and expedited method for removing a fraudulent lien and/or judgment. This remedy can be useful if time is of the essence. The use of a Section 51.903 does not preclude a Chapter 12 claim.

#### **D. APPLICATION AND CHECKLIST**

To repeat, the use of Chapter 12 remedies is *not* a one size fits all remedy for every hospital lien. However, you will find many hospitals, their representatives, their bill collectors, and most counsel completely unprepared to deal with Chapter 12. It is a complete turning of the tables with no presuit notice required.

In evaluating a Chapter 12 claim, please consider the following:

1. Is it a lien at all?
2. Where were the services rendered and what is the history of the facility with regard to billing?
3. Is it a hospital lien or what purports to be a hospital lien?
4. How many liens did the hospital file and does it only cover services that regularly fall under the hospital lien statute?
5. If there is more than one lien, are any of the services included in

each lien duplicated in another lien?

6. Who filed the lien on behalf of the hospital or health care provider?
7. If it is a governmental hospital that is asserting the lien (which may be immune from Chapter 12), did a third party file the lien on behalf of the hospital removing sovereign immunity concerns?
8. Are the charges asserted in the lien reasonable and necessary?
9. What venue will be available?
10. Is removal to federal court likely?
11. Have some charges been paid by a health insurer or other third party payer?
12. Is Cardon Healthcare or other major health services bill collector involved?
13. Who has attempted to collect the lien(s)?
14. Did the liability insurer encourage the filing of the lien (conspiracy to violate Chapter 12)?
15. Have payments been made towards the lien(s) which reduces the amount owed but the lien(s) has remained the same?
16. What attempts and by whom have been made to collect on the "lien"? and

All of these considerations are important and certainly not exclusive factors. The

information you obtain will dictate if you file at all, where you file, the additional claims that you can make such as conspiracy to violate Chapter 12 and injunctive relief, what are your range of damages, etc.

In order to take control of this litigation from the outset, discovery should be attached to your petition. This most certainly includes requests for production and deposition notices(s) with an effective duces tecum. For example, in order to determine whether the charges that compose the hospital lien are proper, it is necessary to seek the facility's catalogue of charges for the services it offers. The catalogue prices can be compared to the prices actually charged. Another item to obtain is the facility's procedures manual for filing hospital liens. A deposition of the organizational representative dealing with hospital liens should be noticed with appropriate areas of inquiry.

#### **E. FORMS AND EXAMPLES**

Attached to this paper is an example of a proposed petition, discovery requests, and deposition notices. These are not canned forms and again caution should be used in not making every hospital lien and/or other lien fraudulent. Use a Chapter 12 claim wisely.

#### **F. A BONUS WEAPON**

Another nasty situation occurs when the lien holder or medical provider chooses to negotiate with the liability insurer directly to purchase the lien or subrogation interest in an attempt to extinguish all or part of a Plaintiff's medical bills. This frequently occurs as a back door transaction with Plaintiff and counsel being the last to know.

In addition to other remedies and defenses that might be available such as

breach of public policy, breach of fiduciary duty by a plan administrator, etc., another claim to consider may be a violation of the client's right to privacy against the liability insurer, subrogating party, and even defense counsel. If the liability insurer and lien or subrogation interest holder do not *both* possess a valid HIPPA release to discuss the client's medical treatment, billings, records, etc, between themselves when discussing negotiating, assigning, and selling the lien or subrogation interest then they are violating the HIPPA statute. 45 C.F.R. §160.103.

HIPPA however does not create a private cause of action but a breach of HIPPA does amount to an invasion of privacy. All who participated in the violation are either directly liable for the breach or participated in the conspiracy to violate Plaintiff's right to privacy. This may easily include defense counsel who participated, including preparing the necessary documentation for the assignment or sale of the lien to the liability insurer.

In addition, a claim may also be made for injunctive relief. The request may include preventing the discussion of Plaintiff's private medical information

between the liability insurer and the subrogating party or prevent the use of an assignment obtained by unlawful means (no valid HIPPA release). It is important to distinguish that you are not contesting the right to subrogate or collect the lien, only that the subrogating party and insurer cannot violate one's privacy in doing so.

## G. CONCLUSION

Chapter 12 of *Texas Civil Practice & Remedies Code* can be used as an effective tactic and strategy to not only make hospitals and other so called lienholders play ball but provide another source for recovery for the client. It must be used surgically and carefully. Shotgun Chapter 12 claims are not effective but can be counterproductive for future Chapter 12 claims.

The sale and assignment of subrogation interests and purported liens by insurers, Rawlings, Ingenix, and other similar entities to a liability insurer can translate into a cause of action for invasion of privacy and injunctive relief. It is yet another opportunity to go from defense to offense.

Please use these weapons wisely.