UNWANTED AND UNWELCOME IN SETTLEMENT DISCUSSIONS

INTRODUCTION

With increasing frequency, settlement discussions involve various trickery, deceit, under the table activity, and downright illegality by insurers, defense counsel, and even medical providers. Often after the fact, Plaintiff's counsel learns: the health insurance "lien", or more accurately, "subrogation interest" has been sold to the Defendant funded by a liability insurer; the liability insurer has notified the hospital that it should file its lien after a settlement was reached; or when attempts are made to ask a medical provider to reduce its bill, it refuses. These are just some of the typical roadblocks creating impediments to settlement.

This paper and presentation will hopefully provide counsel with strategies and counter measures to take the fight from a defensive posture to an aggressive offense. These suggestions are not cure alls to remedy all settlement roadblocks. They are not for the faint of heart. Each alternative should be evaluated cautiously, carefully, and strategically, and not as some automatic response to settlement dilemmas.

A. SO THEY SOLD THE SUBROGATION INTEREST TO THE LIABILITY INSURER

While more prevalent in larger damage cases, liability insurers have been known to purchase a health insurer's or ERISA plan's subrogation interest. It goes something like this: Plan or health insurer claims a subrogation interest in a personal injury lawsuit brought by an insured; the Plan or health insurer has paid about $325,000 in medical bills and expenses for a very seriously injured Plaintiff; the liability insurer armed with its one sided view of paid versus incurred decides that it can minimize or eliminate its exposure by removing or owning Plaintiff's past medical expenses; the liability insurer contacts the Plan or health insurer and offers thirty-three cents ($.33) on the dollar for the subrogation interest. The two parties discuss resolution and the liability insurer agrees to pay the Plan the sum of $109,000. The Plan accepts and defense counsel prepares the necessary paperwork assigning the interest to the Defendant who can then, at the least, claim a credit on any judgment. The Plaintiff has *not* provided any HIPPA release to the Defendant to permit discussions between the liability insurer and the Plan representatives. You learn of this sale about sixty (60) days before trial. Your response cannot be reprinted. Are you up the creek?

The answer is "no." This situation was the subject of a lawsuit styled *Quintana v. Lightener*, originally filed in state court. A copy of the lawsuit is attached to this paper as *Exhibit 1*. The state court trial court granted a temporary restraining order prohibiting the use of this arrangement. A copy of the TRO is hereto attached as *Exhibit 2*.

While the Plan may have a subrogation interest, it cannot simply ignore basic tort law, including violating HIPPA regulations and privacy laws in order to satisfy its interest. Without a HIPPA release, a Plan or health insurer may not discuss a party's private health care information regardless of the existence of a lien or subrogation interest.

With a Plan that satisfies ERISA, preemption and removal become an almost certainty. *Quintana* deals with that dilemma finding that claims such as invasion of privacy, intentional infliction of emotional distress ("IIED"), and conspiracy are not preempted by ERISA and jurisdiction is not exclusive in federal court.

In *Quintana*, Ingenix, not the Plan administrator, removed Quintana's case, relying on complete ERISA preemption. Judge Fish rejected Ingenix's preemption argument and remanded the suit to state court. A copy of the Court's order of remand is attached as *Exhibit 3*.

The short version is that the remand to state court forced a settlement with consideration of the full range of damages,

including all medical bills. A copy of the various briefing in *Quintana* is attached as *Exhibit 4*.

A number of other considerations and factors may also be evaluated. For instance, in the context of ERISA, the Plan administrator owes the participants a fiduciary duty. *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 645 (5th Cir. 1992). Since this is true, can the administrator sell out a participant, thereby compromising or defeating a participant's own personal injury claim? While many fear ERISA, the question of a Plan administrator breaching a fiduciary duty in this context is an unanswered question.

Second, while Texas permits assignments with a great deal of latitude, they are not without limits. For example, assignments of legal malpractice and Deceptive Trade Practices Act claims are generally not permitted. *See PPG Industries v. JMB/Houston Centers Partners*, 146 S.W.3d 798, 85-87 (Tex. 2004); *Zuniga v. Groce, Locke, & Hebdon*, 878 S.W.2d 313, 317-318 (Tex. App. – San Antonio 1994, writ ref'd). The reasoning is that such claims are inherently personal.

While no Texas court has squarely decided the issue of the assignability of a subrogation interest to a party adversary, "it is contrary to public policy to permit a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributes." *Int'l Protein Corp. v. Ralstow-Purina Co.*, 744 S.W. 2d 932, 934 (Tex. 1988).

A solid argument can be made that such assignment violates public policy – putting such claims in the hands of the adversary. The adversary is not settling or buying its peace, but is actually owning a part of the Plaintiff's claim, which creates a number of ethical problems. Indeed, one might argue that such an assignment of Plaintiff's medical bills to an adversary is tantamount to a Mary Carter agreement, whereby a settling party has a financial interest in Plaintiff's lawsuit. *See Elbaor v. Smith*, 845 S.W. 2d 240 (Tex. 1992).

The big picture is that a Plaintiff can be successfully proactive in negating such assignment or, at minimum, create reasonable and persuasive doubt on such an arrangement, thereby putting the "assigned" damages back into play.

One important point must be made in using this strategy. If a Plaintiff provides a HIPPA release to the Defendant, make sure it does not allow oral communications between the medical provider and the HIPPA recipient. If a HIPPA release has been provided by the client or former counsel before you taking over, revoke the HIPPA authorization, and notify the Defendant, the liability, insurer, and any medical provider. With a broad valid HIPPA release, a Defendant or liability insurer will be able to engage in all sorts of communications with medical providers and result in a waiver of privacy.

B. THE LIABILITY INSURER ADJUSTER TELLS THE HOSPITAL ABOUT THE SETTLEMENT SO A LIEN CAN BE FILED BEFORE FUNDING

The Texas Hospital Lien statute provides in pertinent part:

§55.055. Securing Lien

(a) To secure the lien, a hospital or emergency medical services provider must file written notice of the lien with the county clerk of the county in which the services were provided. *The notice must be filed before money is paid to an entitled person because of the injury.*

Tex. Prop. Code Ann. §55.005(a) (Vernon Supp. 2011). Emphasis added.

The significance of the adjuster's conduct is notifying the hospital to file its lien before the settlement is funded; thereby insuring the hospital receives payment. And of course, this required payment now has to be factored into the ultimate client recovery and conceivability puts Plaintiff into a lesser

bargaining position on the outstanding balance which may likely be exaggerated and/or unreasonable.

The same principles discussed in Part A (Selling Subrogation Interests to the Adversary) above apply here. By the adjuster contacting the hospital and a representative of the hospital discussing a client's medical care, including billing without a valid HIPPA authorization, both the adjuster and hospital have committed torts, such as invasion of privacy and/or IIED. The very notion of the hospital even acknowledging a Plaintiff was a patient, much less having incurred charges, strikes at the heart of HIPPA, which is a privacy statute. And while HIPPPA *does not* provide a private cause of action to a Plaintiff, it can provide a basis for a common law tort claim, such as invasion of privacy and/or IIED.

Furthermore, Texas state law also provides protection for a patient's medical records. *See Tex. Occupations Code Ann.* §159.003 (Vernon Supp. 2011) and *Tex. Health & Safety Code Ann.* §241.152 (Vernon 2011). These statutes, likewise, provide a privacy interest by a client regarding their medical treatment, including billings.

Texas statutory law also provides a direct remedy for the unauthorized release of confidential health care information:

§241.156. Patient Remedies

(a) A patient aggrieved by a violation of this subchapter relating to the unauthorized release of confidential health care information may bring an action for:

(1) appropriate injunctive relief; and

(2) damages resulting from the release.

(b) An action under Subsection (a) shall be brought in:

(1) the district court of the county in which the patient resides or in the case of a deceased patient the district court of the county in which the patient's legally authorized representative resides; or

(2) if the patient or the patient's legally authorized representative in the case of a deceased patient is not a resident of this state, the district court of Travis County.

Tex. Health & Safety Code Ann. §241.156 (Vernon 2001).

This statute provides direct authorization to pursue claims against the adjuster and hospital.

In using Section 241.156, be aware of an exception or defense to this statute which provides disclosure "to facilitate reimbursement to a hospital, other health care provider, or the patient for medical services or supplies," is not an unauthorized disclosure. *Tex. Health & Safety Code Ann.* §241.153 (16). Nonetheless, this exception may not be read broadly in light of HIPPA and other privacy statutes. Such exception would likely apply only to communications between health insurers and medical providers.

When dealing with the Hospital Lien Statute, caution must be taken, as an exception to privacy has been carved out:

§55.008. Records

(a) *On request by an attorney for a party by, for, or against whom a claim is asserted* for damages arising from an injury, a hospital or emergency medical services provider shall as promptly as possible make available for the attorney's examination its records concerning the services provided to the injured individual.

Tex. Prop. Code Ann. §55.008(a) (Vernon Supp. 2011). Emphasis added.

Section 55.008(a) appears to suggest an attorney representing the Defendant may obtain the Plaintiff's medical records for "examination." The statute, though, does not permit the attorney to have discussions with the hospital about the records or services. Furthermore, a question arises whether Section

55.008(a) violates HIPPA and whether a HIPPA authorization is required before defense counsel is able to examine the records and/or billings. Be aware of this limited exception to privacy.

When the adjuster decides to discuss your client's outstanding balance with a hospital, inducing the hospital to file a lien before funding, your client does not have to just take it. As to the adjuster, your client has a cause of action to pursue. For the hospital and its employee who communicated with the adjuster and where a hospital lien has now been filed, your client, at worst, has an offset to damages and leverage to negotiate the lien.

Turning the tables on the underhanded liability adjuster is a game changer.

C. THE HOSPITAL OR THIRD PARTY COLLECTOR REFUSES TO NEGOTIATE ITS "LIEN"

Introduction

Before you attempt to settle your client's case, you must deal with a pesky hospital lien. The Hospital Lien Statute does not provide much wiggle room, so how do you get the lien reduced or even extinguished? The answer may well be found in the Fraudulent Lien Statute, *Tex. Civ. Pract. & Rem. Code Ann.* §12.001, et. seq. (Vernon 2011).

The Statute

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 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.

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 lien holder'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 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 material man'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.

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.

Forms and Examples

Attached to this paper as Exhibit 5 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.

D. CONCLUSION

If your client finds himself in one of these unwanted and unwelcome issues in settlement discussions, consider the alternatives offered in this paper. These remedies should be used surgically, strategically, and aggressively as the circumstances warrant. Do not fear the unknown. Be bold.