

SETTLEMENT PROCEEDS: WHO'S ENTITLED TO MONEY?

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This manuscript discusses several of the more common liens and subrogation interests that you may encounter during the handling a personal injury case. The manuscript is written in a practical manner so as to allow for application of the principles to your specific case. This manuscript will not detail the numerous theories and arguments relating to whether or not there exists a legal duty to repay such liens or subrogation interests. These theories and arguments are better left to other authors and the courts as they seem to evolve on an ongoing basis. Moreover, it is ultimately the responsibility of the *attorney*, not the paralegal, to determine if certain liens or subrogation interests should be paid in any case.

In this manuscript I will be using the word “lien” as shorthand for the right of repayment [from your client’s recovery] claimed by entities and organizations. Technically, a “lien” can only be created by statute.¹ A right of reimbursement, i.e. self-funded ERISA plans, is not a lien. For the purposes of this manuscript, there is no functional difference between a right of reimbursement or lien and I will use the term “lien” as a term of convenience. Also for ease of convenience I will use the term “recovery” to refer to proceeds you receive on behalf of your client pursuant to a settlement, judgment or jury verdict.

This manuscript focuses on how to calculate payment of liens and other subrogation interests out of the recovery your client obtains. You should begin ascertaining the existence and amount of any possible liens as early as possible in your client’s case. Among possible lienholders, Medicare generally takes the longest period of time to provide you with lien information. Therefore, you should submit your request for lien statement to Medicare *as soon as you open the client’s file*. You may receive a Medicare lien statement while your client is still treating which means you will later need to request a final Medicare lien statement. But at least you have started the wheels of the Medicare lien information process and perhaps saved yourself several months worth of waiting for a Medicare Final Payment Letter once you actually resolve your client’s case. One of the most frustrating feelings is knowing you have resolved your client’s case but are still awaiting Medicare’s Final Payment Letter before you can disburse settlement proceeds.

You should send out other lien request letters when your client has completed active medical treatment; i.e. has reached maximum medical improvement, or when you know your client will not be returning to the healthcare provider [from whom you will request a lien statement]. The earlier you determine the amount of the liens in your

client's case, the sooner you can pay any liens, pay your client and pay yourself (that is, your hard-earned attorneys' fee and reimbursement for office expenses).

We will review the following liens in the following order:

- Medicare (for the disabled and aged)
- CHAMPUS(for past or current military personnel and their families)
- Medicaid (for the disabled and financially challenged)
- Vocational rehabilitation (statutory obligation to repay)
- Healthcare provider liens (statutory right of repayment held by treating providers)
- Ambulance services (statutory obligation to repay EMS, etc.)
- Workers' compensation
- Child support obligations (statutory obligation of payor of child support)
- Self-funded ERISA plans (contractual obligation to repay the employer or employee welfare plan that paid for medical services and benefits)
- The Special Case Of Assignments Of Proceeds

MEDICARE

Theory: We pay only if payment has not been made or payment cannot be expected to be made promptly..and...if we do pay, it's on the condition that we are paid back when your client recovers money in his/her case.

Medicare is a federal program². Medicare works on the theory that it is the secondary payer of your client's injury-related medical treatment. The primary payer would be the third party's (tortfeasor's) liability insurance, workers' compensation insurance, medical payments insurance or self-insured health plan. In other words, Medicare is the payer of last resort. For purposes of Medicare, "promptly" means payment within 120 days after the earlier of the following:

- a)The date a claim is filed with an insurer or a lien is filed against a potential liability settlement; or
- b) The date the service was furnished or, in the case of inpatient hospital services, the date of discharge.
- c) With regard to all other primary payers, prompt or promptly means payment within 120 days after receipt of the claim.³

Liability insurance companies or third parties generally refuse to pay for any of your client's medical treatment until after you submit the claim for settlement. Therefore the client's claim is usually submitted well after the 120-day post-treatment period. Accordingly, there is a current argument that the "prompt payment" language in the Medicare statute means Medicare does not need to be repaid from your client's recovery.⁴ You should also be aware, however, that there have been no North Carolina or Fourth Circuit cases affirming the validity of this argument. Therefore, I would

suggest careful consideration to those considering not repaying a Medicare lien on the basis of the “prompt payment” theory.

Q: How much do you pay Medicare?:

A: Medicare is entitled to receive [from your client’s recovery] full payment of the amount of the Medicare lien less than the proportional amount of your firm’s attorneys’ fee and office expenses. NOTE: Medicare will not allow as a procurement cost the portion of an attorneys’ fee that exceeds 40%.⁵ There appears to be a 6 year statute of limitations on Medicare’s right to recovery.

Example: Settlement of \$10,000.00. Your firm’s attorneys’ fee is 1/3 and office expenses are \$150.00. Medicare has a lien of \$2,700.00. There are no other liens in the case.

MATH--Attorneys’ fee (\$3,333.33) + office expenses (\$150.00)= \$3,483.33. (This is called the “cost of procurement” by Medicare.)

\$3,483.33 divided by the settlement of \$10,000.00=.348333, which is the proportional amount of your firm’s attorneys’ fee and office expenses.

Multiply the .348333 by the Medicare lien of \$2,700.00 and this yields \$940.50. This \$940.50 represents Medicare’s proportional share of the procurement costs.

Subtract the \$940.50 from Medicare’s original lien amount of \$2,700.00 and this \$1,759.50 is the amount Medicare is to be paid from the settlement. So your Disbursement Sheet looks like this:

SETTLEMENT	\$10,000.00
LESS...	
Atty fees	\$3,333.33
Office expenses	\$150.00
<u>Medicare</u>	<u>\$1,759.50</u>
Total to client:	\$4,757.17

Special case of medical payments coverage: Medicare is entitled to receive **100%** of any medical payments benefits your client recovers but Medicare cannot recover more than the lien amount. This medical payments “credit” will further reduce the amount your client will need to reimburse Medicare.

Exception: Medicare is not entitled to receive medical payments benefits due your client if the medical payment claim is contested.

OTHER NOTES REGARDING MEDICARE.....

Lien applies quite widely: Medicare's lien applies to liability payments as well as underinsured and uninsured motorist coverage.

Cautiously review the itemized lien statement: When you receive an itemized statement of services paid by Medicare (or any alleged lienholder, for that matter), you need to review it carefully to ensure that it does not include services and treatments unrelated to the injuries for which you represent the client. As Medicare typically serves as primary health insurance for disabled and aged persons, it is common for the itemized statement of services to include some charges related to routine medical visits or other medical visits and services unrelated to your client's case. After striking through or otherwise noting the unrelated services listed on the itemized statement of services, you should return the "edited" statement of services to the Medicare lead contractor so she can correctly adjust the lien amount.

Balance billing is allowed: Balance billing is where a healthcare provider, who has already received payment from Medicare for a specific service or treatment, asserts a lien against your client's recovery for the unpaid amount of the same service or treatment. Balance billing is acceptable in the case of Medicare. You will see later, however, that there is a different rule where a healthcare provider has received payment from Medicaid for a specific service or treatment.

Wait to pay: Do not send your lien repayment check to Medicare until you receive their Final Payment Letter. Even though you can do the math and calculate the amount due to Medicare, always wait until you receive confirmation of your math from Medicare. Better to be safe than sorry.

Waiver and compromise: You can request a waiver or compromise of Medicare's lien. A waiver will be granted if repayment of Medicare would cause financial hardship to or would otherwise be unfair to your client. A written request for either a waiver or a compromise will prompt Medicare to send your office (and often your client) an Overpayment Recovery Questionnaire. (Medicare uses the term "overpayment" to refer to payments that it seeks to recover from your client). Upon your completion of the Questionnaire you should forward it to the Durham, North Carolina office of Medicare and await a decision. If you are unhappy with Medicare's decision regarding your request for a waiver or compromise, you can request a reconsideration. A reconsideration must be requested in writing within 60 days of the date of the initial determination. Additionally, you can request a hearing if the lien amount exceeds \$100.00.

SPECIAL NOTE: Even if you request a waiver or compromise of Medicare's lien, you should pay the lien amount in their Final Payment Letter. If the full payment on the lien is not made within 30 days of the date of the Final Payment Letter, the U.S. government can seek to collect on the debt under the Federal Claims Collection Act.⁶ A payment, however, of Medicare's lien does not serve as a waiver of your request for a waiver or compromise of Medicare's lien.

If you pay the client, hold some money back: The process for your request for a waiver or compromise takes time and your client may want to receive their money before you receive a final response from Medicare. If you are inclined to disburse some of the recovery monies to your client before receiving a final response from Medicare, it is generally best to set aside or “hold back” in your client trust account enough money to pay the maximum amount of Medicare’s lien. This way if your waiver or compromise request is denied, you will have the funds to pay Medicare. If you don’t hold some monies, you may have to dip into the office war chest to repay Medicare----avoid this at all costs.

CHAMPUS

The Civilian Health And Medical Program Of The Uniformed Services (CHAMPUS) is a program of medical, surgical and dental assistance and benefits for veterans and their dependents.⁷ Like Medicare, CHAMPUS is entitled to reimbursement from any proceeds your client receives. Under the Federal Medical Care Recovery Act, CHAMPUS is authorized to seek reimbursement of the reasonable value of medical care furnished or paid for a person who is injured or suffers a disease under circumstances creating tort liability in a third party.⁸ There are no deductions allowed for attorneys’ fees and there is no cap on the amount of the CHAMPUS lien.

You and your client have an obligation to provide the federal government with information regarding the circumstances surrounding an injury as a condition precedent to the processing of a CHAMPUS lien. Usually, CHAMPUS obtains liability and insurance information from your client and has your client complete an assignment of benefits form *before* CHAMPUS pays for injury-related medical services. If, however, CHAMPUS has paid for injury-related medical services without previously obtaining this information, CHAMPUS may ask you or your client to complete the same. You and your client should probably cooperate with CHAMPUS much like you would with Medicare. CHAMPUS works much like Medicare in that you will receive an itemized listing of all amounts expended by the United States for care resulting from the incident upon which potential liability in the third party is based. It is essential that your office audit this listing and ferret out any unrelated charges. The only way this author can see that such cooperation would not be needed is if your client’s claim does not involve the medical services furnished or paid for by CHAMPUS. I would dare say this is rarely the case.

Frequently, collection actions under the Federal Medical Care Recovery Act are referred to the Department of Justice. CHAMPUS officials can only waive or compromise liens of \$40,000 or less. A lien in excess of \$40,000 may be compromised, settled, waived and released only with the prior approval of the Department of Justice. You can request an administrative hearing of the federal government’s decision regarding compromise or waiver of the CHAMPUS lien in your client’s case.⁹ In sum, CHAMPUS liens should be treated as Medicare liens: pay them from your client’s recovery but try to get them reduced or compromised.

KEY NOTE: As CHAMPUS and Medicare liens are created by federal law, they take priority over all other liens mentioned in this manuscript.

MEDICAID

Medicaid is federal program that is administered by the State of North Carolina's Department of Human Resources¹⁰. Failure to notify Medicaid of the existence of a claim or the identity of any person against whom the client/beneficiary has a right to recovery is a Class 1 misdemeanor.¹¹ You are put on notice of a Medicaid lien if you see a healthcare provider bill which says or suggests Medicaid's involvement in your client's case.

Q: How much do you pay Medicaid?:

A: Medicaid is entitled to receive [from your client's recovery] full payment of the amount of the Medicaid lien but the Medicaid recovery cannot exceed 1/3 of the gross amount recovered in the case. If there is a Medicare lien on a client's recovery, Medicaid can only recover money if the Medicare lien is less than 1/3 of the client's recovery. If the Medicare lien is in fact less than 1/3 of the client's recovery, Medicaid can only receive a refund for the difference up to 1/3 of the recovery. Additionally, Medicaid is required to pro-rate its lien with all other valid lienholders.¹² Confused? Hope not....here's an example.....

Example: Recovery of \$12,000.00; a Medicare lien of \$3,000.00 and a Medicaid lien of \$1,500.00. No other liens exist. Under the law, only 1/3 of the \$12,000.00 recovery, or \$4,000.00, is available to pay the Medicare and Medicaid liens. From this \$4,000.00, Medicare gets its full \$3,000.00 leaving the other \$1,000.00 for Medicaid's lien. Medicaid will just have to "eat" the remaining \$500.00.

NOTE: Medicaid does not allow a deduction for attorneys' fee. Exception: Under the Third Party Recovery Act, attorneys' fees can be deducted for Medicaid payments made prior to August 15, 1996.

Let's try to put all of this math together....

Example: Settlement of \$60,000.00. Your firm's attorneys' fee is 1/3 and office expenses are \$70.00. Medicaid has a lien of \$33,000.00. There are no other liens in the case. HealAll Hospital has a lien of \$2,500.00 and has neither filed nor received any payment from Medicaid.

MATH—1/3 of the recovery in your client's case is \$20,000.00 and this is the "cap" as to what Medicaid can recover in this case. As there is at least one other healthcare provider or entity with a lien, however, Medicaid must pro-rate their lien and share the \$20,000.00 available for liens.

First, add all the liens:

Medicaid	\$33,000.00
HealAll Hospital	\$2,500.00
<hr/>	
TOTAL LIENS	\$35,500.00

Next, divide each lien by the total lien amount and you get the pro-rata share.

Medicaid's pro-rata share of the \$20,000.00 in available funds is \$33,000.00 divided by \$35,500.00 or .9295774.

HealAll's pro-rata share of the \$20,000.00 available funds is \$2,500.00/\$35,500.00 or .0704225.

Based on the pro-rata shares, Medicaid receives \$20,000.00 x .9295774 or \$18,591.55.

Based on the pro-rata shares, HealAll receives \$20,000.00 x .0704225 or \$1,408.45.

So your Disbursement Sheet looks like this:

SETTLEMENT	\$60,000.00
LESS....	
Medicaid	\$18,591.55...
HealAll Hospital	\$1,408.45
Atty fees	\$20,000.00
<u>Office expenses</u>	<u>\$70.00</u>
Total to client:	\$19,930.00

Exception: Medical payments coverage. Like Medicare, Medicaid is entitled to receive 100% of any medical payments benefits due your client but again Medicaid cannot recover more than the lien amount. This medical payments "credit" will further reduce the amount your client will need to reimburse Medicaid.

No balance billing!: Be sure to review the itemized statement of services paid by Medicaid. A healthcare provider that has received payment from Medicaid for a specific service or treatment cannot assert a lien against your client's recovery for the unpaid balance of the same service or treatment. You need not honor the lien claimed by the healthcare provider and be sure to inform your client that he does not owe the "balance" either. Any balance is essentially waived or erased by the healthcare provider's acceptance of Medicaid benefits.

Also... be on the lookout for any of your client's medical bills that have the language "MEDICAID RECIPIENT; BENEFITS ASSIGNED" or something similar. This language means the healthcare provider has essentially elected to file its claim with Medicaid and cannot assert a lien against your client's recovery. Only Medicaid can

recover for the bill and the healthcare provider is prohibited from the practice of balance billing.

Waiver and compromise: Federal law states that Medicaid maintains possesses no authority to either waive or compromise their lien interest. State law, however, says that Medicaid cannot waive but may compromise its lien interest. On some occasions, the equities of your case dictate that you request a waiver or compromise. Given a semi-detailed explanation of your client's circumstances, a Medicaid representative may make a special concession with respect to the Medicaid lien. You should not expect this concession, however, and you should inform your client that the request will likely not be granted.

We will get our money!: Medicaid has the right to garnish your client's wages or place withholding on the client's state tax refund in order to recover a lien payment.¹³ Medicaid can even recover unpaid lien amounts from the estate of a deceased Medicaid beneficiary.¹⁴ Therefore it is in your client's best interests to repay Medicaid out of the recovery in his case.

Special Needs Trusts: There are some cases in which a special needs trust would be in your client's best interest. If you have a client with a serious permanent injury, especially in the case of minor clients, it may be necessary to speak with an attorney who specializes in special needs trusts and determine the advisability of establishing the same for your client. If a special needs trust is contemplated, you need to contact the Department of Social Services in which your client resides to ensure that the client's special needs trust (which is presumably funded with a portion of the monies from his or her tort recovery) does not render him or her ineligible for ongoing Medicaid benefits.

CAUTION: Not related to liens but important to your client--→Spenddown issue: If your client is a Medicaid recipient, you need to be mindful of how their portion of the recovery could affect ongoing Medicaid eligibility. Generally, a Medicaid recipient can possess no more than \$2,000.00 in assets.¹⁵ If they possess or receive more than this amount, their Medicaid eligibility will be suspended. As settlement or other recoveries for legal claims are counted as assets, it may be necessary for your client to "spenddown" some of their recovery if they desire to retain ongoing Medicaid eligibility. The details and vagaries of Medicaid, however, are far too many to adequately address in this manuscript and you should contact your client's Medicaid caseworker to discuss the implications of the client's recovery.

VOCATIONAL REHABILITATION

The State Vocational Rehabilitation program provides different forms of assistance to persons who are injured. This assistance includes but is not limited to: job retraining, career transitional services, counseling, guidance, placement services and even independent living services. Vocational Rehabilitation has a right to recover from virtually any source of recovery or funds that your client may receive.¹⁶ If Vocational Rehabilitation provides services for your client, you must repay the state of North

Carolina for the services.¹⁷ The method of reimbursement under North Carolina law is as follows:

Total recovery...

LESS court costs taxed;

LESS attorneys' fees (but only to the extent of 1/3 of the total recovery);

....then pro-rate the Vocational Rehabilitation lien with all other valid liens.

The amount due Vocational Rehabilitation, like Medicaid, can be no more than 1/3 of the total recovery. Unlike Medicaid, however, Vocational Rehabilitation does have the authority to either waive or compromise their lien.¹⁸

HEALTHCARE PROVIDERS' LIENS

N.C.G.S. § 44-49 and 44-50 cover liens claimed by physicians, hospitals, nurses, dentists, ambulance services and seemingly any entity which has provided health care services related to the injury for which your client has recovered. Although chiropractors are not listed in the statutes, their liens are likely covered.¹⁹ Medicare and CHAMPUS liens supercede N.C.G.S. § 44-49 and 44-50.

REMINDER: In doing your N.C.G.S. § 44-50 calculation, be sure that you do not include lienholders who have received payments from Medicaid.

The requirements for a healthcare provider to have a lien under N.C.G.S. § 44-49 and 44-50 are as follows:

- Attorney requests client's medical records or itemized bill from healthcare provider AND
- Healthcare provider provides attorney with client's medical records or itemized bill **free of charge** AND
- Healthcare provider provides attorney with written notice of the lien claimed.²⁰

After determining which healthcare providers have liens under N.C.G.S. § 44-49(b), you are ready to do the math and determine how much they receive from your client's recovery. N.C.G.S. § 44-50 does not set out any mathematical formula but the North Carolina Court of Appeals has apparently approved of the following formula in at least one case.²¹ Subsequently, the Court of Appeals has stated that a pro-rata distribution is not required in the case of too many providers with liens and too little money.²² Again, the attorney should determine the division of the monetary amount available to lienholders.

MATH:

1. Deduct the amount of the attorneys' fees from the amount recovered by your client.

2. Divide the remaining recovery monies by 2. This amount is the maximum amount of your client's recovery that can be allotted to all lienholders.
3. Add the amounts of all liens determined under N.C.G.S. § 44-49 and 44-50. If the total amount of liens exceeds the total amount allotted to all lienholders, go to Step 4 to determine the pro-rata amount due each lienholder.
4. Divide the maximum amount allotted to all lienholders by the total amount of all liens under N.C.G.S. § 44-49 and 44-50. You will derive a ratio.
5. Multiply the ratio by each lienholder's amount. The result is the pro-rata share to be paid to each lienholder from your client's recovery.

Now for a real world example (well, sort of...):

Settlement of \$23,000.00. Attorneys' fee of 1/3 of recovery. Expenses of \$100.00.
 Lienholders under 44-49 and 44-50 are as follows: HealAll Hospital \$5,500.00;
 BonesRight Orthopaedic Clinic \$2,600.00; BackTogether Physical Therapy \$1,100.00.

1. \$23,000.00 (total recovery) – \$7,666.67 (attorneys' fee) = \$15,333.33.
2. \$15,333.33 divided by 2 = \$7,666.67; this is the maximum amount allotted to pay all lienholders.
3. \$5,500.00 + \$2,600.00 + \$1,100.00 = \$9,200.00; this is the total amount of all liens. Since the total amount of the liens exceeds the total amount allotted to all lienholders, you will need to determine the pro-rata amount due each lienholder.
4. \$7,666.67 divided by \$9,200.00 = .8333336; this is your ratio.
5. HealAll Hospital will get \$5,500.00 x .8333336 or \$4,583.33; BonesRight will get \$2,600.00 x .8333336 or \$2,166.67; BackTogether will get \$1,100.00 x .8333336 or \$916.67.

Therefore, your Disbursement Sheet should appear as follows:

Settlement	\$23,000.00
LESS...	
Attorneys' Fees	\$7,666.67
Expenses	\$100.00
LESS...	
HealAll Hospital	\$4,583.33
BonesRight	\$2,166.67
<u>BackTogether</u>	<u>\$916.67</u>
CLIENT	\$7,566.66

Under the circumstances, this math appears unfair to your client. Your client will receive less than 1/3 of the total recovery and, since the lienholders' respective bills were more than what they can receive under the pro-rata, the lienholders can still seek to recover the balance of their respective unpaid bills from your client. This unfair math

would present an opportunity for you to request each of the respective lienholders to accept their N.C.G.S. § 44-50 amount as full and final payment on your client's bill. Always get such an agreement in writing and signed or agreed to by either the physician, chiropractor or someone in the healthcare provider's billing/patient accounting department. Our office typically has the healthcare provider send a short fax or letter confirming they will accept a reduced amount as full and final payment of a client's outstanding bill. Do not send the money to the healthcare provider until you receive written confirmation of such an agreement. Though you may not be required to negotiate lien reduction agreements, doing so successfully clearly helps your client.

SPECIAL NOTE: Lien laws of other states

Remember the rules and principles cited in this manuscript only apply to liens for unpaid medical bills of healthcare providers located in North Carolina. If your client has medical treatment or other services provided outside of North Carolina you should look to the laws of the relevant state in order to determine when and how a lien is created.

For example, in Virginia a healthcare provider can have a valid lien against your client's recovery but not to exceed the amount of \$2,000.00 in the case of a hospital and \$500 in the case of a physician, nurse, physical therapist, or pharmacy.²³ In order to create a lien the healthcare provider must provide you or your client with written notice of lien.²⁴ Strangely enough, like the N.C.G.S. § 44-49, there is no requirement that the notice of lien contain the amount of the lien claimed. No written notice is required if the client's attorney knew medical services were either provided or paid for by the Commonwealth of Virginia.²⁵

AMBULANCE SERVICE LIENS

N.C.G.S. § 44-51.8 contains a long list of the counties to which the ambulance service lien applies. Although the list seems to include virtually every county, you should still consult the statute to see if the county relevant to your case is covered. There is no statutory allowance for an attorneys' fee or costs reduction of ambulance service liens.

Ambulance service liens must be filed with the Clerk of Superior Court in order to be perfected. Ambulance service liens can be asserted versus real property only if the lien was filed with the Clerk of Superior Court within 90 days after the date service was furnished.²⁶ The county can utilize garnishment or attachment proceedings to recover the lien amount from your client if the lien was filed with the Clerk of Superior Court within 90-180 days after the date service was furnished.²⁷ (This means the county could take your client's wages, bank deposits, personal property, etc.) The lien exists for 10 years from the date the service was furnished or 3 years from the date of the recipient's death.²⁸

A county's failure to file their outstanding bill with the Clerk of Superior Court within 180 days of the date service was furnished means only that the county cannot

undertake the aforementioned procedures to recoup its money. The county would retain a lien under N.C.G.S. § 44-49 and 44-50, *infra*. It is usually best to deem any ambulance service bill a lien and pay it from the recovery. Unless the bill involves long distance transport, air ambulance services or some expensive services, the bill will most likely be under \$300.00 and it is probably in your client's best interests to pay it from the recovery. If the bill is not paid, your client likely will continue to receive billing and collection letters from the ambulance service.

WORKERS' COMPENSATION

Workers compensation benefits received by your client, whether medical benefits paid or indemnity payments or other benefits, create a lien against any recovery your client receives from a third-party tortfeasor for an on-the-job injury.²⁹ You are allowed to deduct attorneys' fees and office expenses from the workers' compensation lien.³⁰ The amount, however, of the attorneys' fee to be deducted cannot exceed 1/3 of the amount recovered in the client's case.³¹ It appears that even a recovery of uninsured or underinsured motorist monies would be subject to a workers' compensation lien.³²

You should seek to negotiate a reduction of repayment on all workers compensation liens. If you reach an agreement with the workers' compensation carrier regarding a reduced lien repayment amount, you should prepare an application and order to the North Carolina Industrial Commission approving such disbursement. You will need to receive the signed order before you disburse any recovered funds. If you are unable to reach an agreement with the workers' compensation carrier regarding a reduced lien repayment amount, you can petition a Superior Court judge to decide upon the reimbursement amount, if any, to be paid to the employer or insurance carrier after proper notice to the employer.³³

CHILD SUPPORT

If your client is either 3 months or \$3,000.00 in arrears on court-ordered child support, a lien is created.³⁴ Your client must have been served with the child support lien in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. Child support liens take priority over all subsequently acquired liens (presumably with the exception of Medicare and CHAMPUS) and continue from the date the lien is filed with the Clerk of Superior Court in the county in which the child support was ordered.³⁵ Even an out-of-state child support lien, if recorded with the Clerk of Superior Court and served on your client, is entitled to the same full faith and credit as a North Carolina child support lien.³⁶

A child support lien is also created if the "...Department of Health and Human Services or other obligee..." sends written notification to the tortfeasor's insurance company that your client owes past due child support of over \$3,000.00 and also provides a certified copy of the court order with proof that the amount is past due.³⁷ As to priority of a child support lien, it is paid after all healthcare provider liens.³⁸

This is a little-known area of the law and there does not appear to be vigorous enforcement of said liens. Nonetheless, a prudent practice is to ask your client if he or she is under a child support order and has received notice of arrears or some lien for past due child support. Paying the outstanding child support amount could be a way for you to help your client relieve an unrelated financial obligation that would otherwise remain outstanding.

SELF-FUNDED ERISA PLANS

The relative priority of a self-funded ERISA plan's right to recover is difficult to state. The self-funded ERISA plan should likely be paid after Medicare and CHAMPUS but should fall somewhere in the collective pot along with any other remaining lienholders. Be aware, however, that there is much debate at this time (as of June 2003) as to whether self-funded ERISA plans are entitled to any reimbursement from your client's recovery. This topic is far too complicated to discuss and decide in this manuscript. Essentially, your supervising attorney should make final decisions as to the existence of liens and priority of payment of liens.

SPECIAL CASE OF ASSIGNMENTS OF PROCEEDS

An assignment of proceeds is essentially a written statement or document signed by your client granting a person or entity the right to receive payment directly from the recovery in the client's case. Assignments are most often seen when your client has treatment with a chiropractor but they can be held by any healthcare provider whom has had your client execute such an agreement. Assignments are sometimes found in the case of a litigation-financing group that has loaned money to your client pending a settlement or recovery in his case. Some clients even utilize assignments as means to repay loans or other debts that may be unrelated to the case for which you represent them.

DISBURSEMENT RULES

- If a lien exists and client instructs you to pay the lien, pay the lien.
- If no lien exists but client instructs you to pay the item, pay the outstanding bill.
- If no lien exists and client instructs you not to pay the outstanding bill, do not pay the outstanding bill. You must abide by the instructions of your client with respect to disbursement of settlement funds unless the funds are subject to a valid lien.³⁹ Be sure to remind your client (preferably in writing on the Disbursement Sheet that she signs) that she remains solely responsible for any unpaid bills.
- If a lien exists but client instructs you not to pay the lien—STOP! Keep in your client trust account the money allotted for the disputed lien. The client and the

lienholder must resolve their dispute before you can disburse the funds. If the dispute cannot be resolved, you may choose to seek the interpleader remedy under Rule 22 of the North Carolina Rules of Civil Procedure. This means that you would remit the funds to the clerk of court while the client and the healthcare provider fight it out. While clearly available, however, the interpleader remedy should be utilized only as a last resort. Try to iron out the dispute between your client and the lienholder so you, the client, and the lienholder can close the chapter and move on with your respective lives.

Three general rules in handling liens:

1. Err on the side of caution: If you determine that a healthcare provider or other entity does not have a lien under applicable law, this does not mean the unpaid amount disappears. It only means your client is not required to pay the “non-liens” out of the recovery in her case. As your client was the beneficiary of the funds received from the lienholder, it is your client who will remain ultimately responsible for repayment of the funds. The lienholder can and often will come after your client for the money still owed. It is a good idea to inform your client of this fact to see if it affects the client’s decision to pay a lien out of the settlement proceeds.
2. Put protective language in your Disbursement Sheet: Have language in your office Disbursement Sheet that signifies the client understands and approves of the disbursement and distribution of the settlement proceeds as listed on the Sheet. Generally, the Disbursement Sheet should state that the client understands that he is responsible for any and all amounts or outstanding balances not listed on the Sheet including, but not limited to, repayment of a subrogation interest claimed by a self-funded ERISA plan. This protective language is helpful if and when a client contacts your office several weeks or months after disbursement because the lienholder is chasing them down for an unpaid balance.
3. Put full and final payment language on your check to the lienholder: If the lienholder cashes the check marked “full and final payment of lien interest” (or something similar) but later seeks to argue that there is still an unpaid amount on their lien interest, you may have some leverage. If you get written confirmation of the final repayment amount and then send your check with the “full and final payment” language, you should have few problems, if any.

In closing, it is exceedingly rare that you will need to contemplate and calculate all of the aforementioned liens in any one case. This manuscript should provide you some direction and guidance on how to handle some of the more commonly faced liens or “parasites” upon your client’s recovery. After you have figured out the rules, done the math, had your client sign the appropriate settlement documents, cut the checks and sent out the checks to the respective payees, you are done....Happy Disbursing!

¹ North Carolina Baptist Hospital v. Mitchell, 323 N.C. 528 (1988); Charlotte-Mecklenburg Hospital Authority v. First of Georgia Insurance Company, 112 N.C. App. 828 (1995).

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- ² 42 U.S.C. § 1395y(b)(2).
- ³ 42 CFR 411.50.
- ⁴ See “Should You Really Be Sharing Your Client’s Recovery With Medicare?” by Ben Glass, April 2003 TrialBriefs @ p.32; see also www.benglass.com.
- ⁵ 42 CFR 411.27© and (d).
- ⁶ 45 CFR 20.13.
- ⁷ 32 CFR 199 et. seq.
- ⁸ 42 U.S.C. 2651 et. seq.
- ⁹ 32 CFR 199.10.
- ¹⁰ N.C.G.S. § 108A-57.
- ¹¹ N.C.G.S. § 108A-57(b).
- ¹² N.C.G.S. § 108A-57(a).
- ¹³ N.C.G.S. § 108A-70.
- ¹⁴ N.C.G.S. § 108A-70.5.
- ¹⁵ Adult Medicaid Manual, MA-2230.
- ¹⁶ N.C.G.S. § 143-547(b).
- ¹⁷ N.C.G.S. § 143-547.
- ¹⁸ N.C.G.S. § 143-547(d).
- ¹⁹ See Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201 (2000).
- ²⁰ N.C.G.S. § 44-49(b).
- ²¹ See North Carolina Baptist Hospital v. Mitchell, 323 N.C. 528 (1988).
- ²² See North Carolina Baptist Hospital v. Crowson, 573 S.E.2d 922 (2003).
- ²³ Virginia Code, 8.01-66.2.
- ²⁴ Virginia Code, 8.01-66.5.
- ²⁵ Virginia Code, 8.01-66.5.
- ²⁶ N.C.G.S. § 44-51.2.
- ²⁷ N.C.G.S. § 44-51.6.
- ²⁸ N.C.G.S. § 44.51.1.
- ²⁹ N.C.G.S. § 97-10.2.
- ³⁰ N.C.G.S. § 97-10.2(f)(1).
- ³¹ N.C.G.S. § 97-10.2(f)(1)b.
- ³² See Creed v. R.G. Swaim & Son, 123 N.C. App. 124 (1996); Bailey v. Nationwide, 112 N.C. App. 47 (1993).
- ³³ N.C.G.S. § 97-10.2(j).
- ³⁴ N.C.G.S. § 44-86(b).
- ³⁵ N.C.G.S. § 44-86(e).
- ³⁶ N.C.G.S. § 44-86(g).
- ³⁷ N.C.G.S. § 58-3-185(a).
- ³⁸ N.C.G.S. § 58-3-185(b).
- ³⁹ See Rule 1.15.2 of the Revised North Carolina Rules of Professional Conduct and RPC 69 and RPC 125.