

# Balance Billing Liens After *Olszewski* and others

William A. "Bill" Daniels  
BILL DANIELS LAW

2003 CAALA  
Las Vegas Convention  
Mandalay Bay Hotel

# Financial Pressures are Building

- Medical care providers are looking for additional revenue as their bottom-lines are squeezed and are looking to personal injury funds as a source.



# Balance Billing Basics

- Generic definition is billing for the difference between the full cost of service and the amount paid by insurance.
- Balance billing in our discussion is effected by asserting a lien claim against a personal injury recovery

# Balance Billing Can Affect Your Measure of Special Damages

- Hanif v. Housing Authority of Yolo County (1988) 200 C.A.3d 635, 246 C.R. 192
- Holding: The plaintiff was entitled to recover as special damages only the amount actually paid by Medi-Cal on plaintiff's behalf, not the full "reasonable" value of care.
- So, plaintiff may recover as specials only the amount of medical expenses actually incurred and owing.

# Inability to Balance Bill Can Diminish Your Measure of Special Damages

- Nishihama v. City & County of S.F. (2001) 93 C.A.4<sup>th</sup> 298, 112 C.R.2d 861
- Award reduced to amount equal to that which insurer actually paid.
- Blue Cross had a contract with CPMC under which CPMC agreed that Blue Cross would pay reduced rates for specified services rendered to members, and CPMC would accept Blue Cross's payment as payment in full for those services.
- "We find that CPMC's lien rights do not extend beyond the amount it agreed to receive from Blue Cross as payment in full for services provided to plaintiff."

# Balance Billing Jurisprudence is in Transition

- McMeans v. Scripps Health
- Olszewski v. Scripps Health



# *McMeans* – Different Contracts



- Class action regarding Hospital Lien Act (Civil Code sec. 3045.1) liens from Scripps Health Inc. Review of cross motions for summary judgment
- 1. McMeans: lien on service provided under Aetna policy where Scripps had contract agreeing to accept insurance as payment in full.
- 2. Shaul: lien on service provided under Sharp Choice plan which had NO contract w/ Scripps.
- 3. Denny: lien on service provided under CaliforniaCare policy that did not provide coverage for injuries caused by third parties (advance against recovery).



# McMeans Results

- Follows *Nishihama* reasoning. “We conclude Scripps’s ‘lien rights do not extend beyond the amount it agreed to receive from [Class members’ medical insurance carriers] as payment in full for services provided to [Class members].”
- McMeans: lien is limited to amount actually paid by insurance (no balance billing).
- Shaul and Denny: liens valid for entire amount of reasonable and customary charges.
- Hospital has burden of showing what reasonable and customary charges are.
- Liens are privileged under Civil Code sec. 47.

# *McMeans* – Review Granted



- Review granted, November 26, 2002.
- “Further action in this matter is deferred pending consideration and disposition of a related issue in *Olszewski v. Scripps Health*, or pending further order of the court.”
- STATUS: Now briefing.

## *Olszewski*

- Class action by Medicaid recipient under UCL.
- Demurrers sustained without leave.
- Held: Federal Medicaid law preempts state provider lien statutes.
- Held: Provider lien statutes provided safeharbor from UCL claims.
- Held: Litigation privilege applies to health provider's pursuit of statutorily authorized lien and so protects provider from derivative suits.

# *Olszewski*

- Welf. & Inst. Code sec. 14124.791 creates a balance billing lien for Medi-Cal providers.
- Defendant asserted a balance billing lien using 14124.791 and Civil Code sec. 3045.1.
- “While federal law requires the state Medicaid agency to obtain full reimbursement of Medicaid payments whenever possible, it strictly limits the ability of providers to obtain reimbursements for their services.” 937

# *Olszewski*

- “Under 42 CFR part 447.15, “the provider must ‘accept’ [the Medi-Cal] payment plus any cost-sharing charges allowed under the plan as ‘payment in full.’”
- “Thus, a health care provider may, at most, recover a ‘nominal amount’ from the beneficiary.”
- Sections 14124.791 and 14124.74 allow the provider to assert an interest in the personal property of the Medicaid beneficiary since an entire personal injury award is subject to lien.
- “We therefore conclude that federal law preempts sections 14124.791 and 14124.74.”
- “But we do so reluctantly.” Urges the Legislature act to correct the situation.

# SB 494

- Carried by Senator Martha Escutia. Presently under negotiation. Will likely be limited to *Olszewski* issues.
- Codifies the collateral source rule and overrules *Hanif* and *Nishihama*.
- Provides hospitals the right to assert liens on personal cases, however the lien must be limited to the patient's recovery of past medical expenses.
- The lien is subject to reductions for comparative fault and a pro rata share of attorney's fees and costs consistent with the Common Fund Doctrine.
- Creates a motion procedure for a judicial determination of lien reductions in the event the parties cannot agree.

Additional information can be found at  
<http://BillDanielsLaw.com>

Balance Billing After Olszewski

The law surrounding balance-billing law is rapidly evolving.