Monday, May 29, 2006

A Trap for the Unwary

Subrogation can be a minefield for defendants, too

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Special to the Law Weekly

A recent trend in civil litigation has been the proliferation of disputes over the repayment of subrogation liens and encumbrances and the right of lien holders to pursue the same against the settling parties. While the law of subrogation is most often spoken of as a minefield for plaintiff's attorneys, defense attorneys should also be aware of the pitfalls and potential exposure to a third party tortfeasor, or that tortfeasor's carrier.

Generally speaking, under Pennsylvania law, a lien holder or one who seeks payment on unpaid medical bills has a statutory or common law right to seek reimbursement for the medical treatment provided so as to avoid unjust enrichment on the part of the injured party or the third party tortfeasor. Subrogation is an equitable remedy that rests on the principles of unjust enrichment and attempts to accomplish complete and perfect justice among the parties. See *In re McGrath's Estate*, 46 A.2d 735 (Pa. Super. 1946) as well as 73 Am.Jur.2d "Subrogation" Section 11 (2005). Certain liens or subrogation rights against third party tortfeasors have been recognized and preserved by statute. Statutorily, liens may be pursued against a third party tortfeasor, at the very least, where the lien holder is the Department of Public Welfare, a worker's compensation carrier or employer, a federal plan or entity, or certain HMOs.

More specifically, in terms of the Department of Public Welfare, the Pennsylvania has passed the following statute that provides, in Section 4604 subsection (d): "Lien against proceeds – In order to carry out the purposes of this section, the department shall have a first lien against the proceeds of any cause of action that existed during the time an individual, his spouse, or his unemancipated children received cash assistance. Unless otherwise directed by the department, no payment or distribution shall be made to a claimant or claimant's designee of the proceeds of any action, claim or settlement where the department has an interest without first satisfying or assuring the satisfaction of the interest of the commonwealth. Any person who, after receiving notice of the department's interest, knowingly fails to comply with this subsection shall be liable to the department; and *the department may sue and recover from the person* [emphasis added]."

Thus, under the express terms of this statute, the Department of Public Welfare could potentially have a lien to assert against a third party tortfeasor or that tortfeasor's liability carrier.

Under Section 319 of the Pennsylvania Worker's Compensation Act, it is provided in relevant part, as follows: "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, *against such third party* to the extent of the compensation payable under this article by the employer…." See 77 Pa.C.S.A. Section 671.

The Pennsylvania cases construing Section 319 of the Worker's Compensation Act have treated the employer's right to pursue a subrogation lien against a third party tortfeasor or that tortfeasor's liability carrier as automatic and essentially incapable of being defeated.

Self-funded ERISA health plans and federal plans or entities are also still permitted to pursue a recovery of their subrogation liens. See *FMC v. Halliday*, 498 U.S. 52 (1990); *Roberts v. Brytczuk*, 65 Pa.D.&C. 4th 510 (C.P. Centre 2004), ordering a third-party defendant to pay medical expenses awarded directly to health plan.

Liens have also been held to be allowable for certain HMOs in motor vehicle accident cases despite seemingly contrary provisions of the MVFRL. See *Wirth v. Aetna*, 2004 U.S. Dist. Lexis 8866 (April 2004); *Nott v. Aetna*, 303 F.Supp. 564 (U.S. Dist. 2004).

In addition, it has been recognized in a few cases that a carrier who has paid medical bills under the law of a different state may have a lien under a conflicts of law analysis in certain limited circumstances.

As noted above, separate and apart from different statutorily recognized rights to pursue a subrogation lien against third party tortfeasors, lien holders may also pursue such claims under general principles of equitable law where such claims are not otherwise precluded by the MVFRL.

There does not appear to be any duty on tortfeasors or defense carriers to seek out or determine the existence of any liens. However, it may be wise for the defense to inquire of the plaintiff as to the existence of any such liens so as to reconfirm the burden of the plaintiff to discover and satisfy any such liens or encumbrances.

In the case where the defense has been put on notice of a lien or encumbrance, defense counsel should advise the lien holder of the settlement of the case and confirm, in writing, with plaintiff's counsel and the lien holder that any and all liens are to be satisfied out of the settlement proceeds.

In all cases, even cases where no notice has been provided as to the existence of any liens, defense attorneys still need to protect their clients from having to litigate any potential liens that may be asserted in the future. The best protection is the inclusion of a standard indemnification clause in the release. Such a clause may read as follows:

In consideration of the payment of the sum, the undersigned further agrees to indemnify [the tortfeasor], his or her agents, employees, subsidiaries, and affiliates and save them harmless from any and all further liability, loss, damage, claims of subrogation and expense arising from any of the injuries and damages sustained by the undersigned, and, if necessary in order to save them so harmless, to satisfy on their behalf any judgment against them arising in any way out of the undersigned's injuries and damages.

Under the terms of an indemnification clause, if lien holders approach the settling defendant or their carrier in the future for payment of the lien, the settling defendant and carrier can simply respond with a letter directing the lien holder to contact the injured party on the grounds that the injured party previously agreed to indemnification on any such claims in the release. Time-consuming and expensive litigation over the lien may then be avoided the third-party tortfeasor or carrier.

Obviously, if the release does not include an indemnification clause, the third-party tortfeasor, may need to keep a file open on a case that has essentially been resolved with the injured party as there may be future litigation over the non-payment of the lien.

Note, however, that the need to keep the file open may be slight, especially in cases where the tortfeasor or the defense carrier has never been put on notice of any potential lien by the lien holder. It is well established under Pennsylvania law that where the defense has not been notified of any lien by the lien holder or by Plaintiff's counsel, it would be unjust and against the equitable principles that underlie the doctrine of subrogation to allow a lien holder to pursue a recovery against the unaware defendant or their carrier after a settlement has been negotiated and the settlement proceeds paid out. *Travelers Insurance Co. v. Hartford Accident and Indemnity Co.,* 294 A.2d 913 (Pa.Super. 1972); *Braddock v. Ohnmeiss*, 867 A.2d 539 (Pa.Super. 2005).

Thus, subrogation issues are not a cause for concern for only plaintiff's counsel. Rather, the potential of a lien being asserted against the third party tortfeasor or its carrier is not simply a perceived risk, but a real risk of future liability due to the numerous ways in which such liens are recognized and allowed under Pennsylvania law. Accordingly, when settling a case, both plaintiff's counsel and defense counsel should work together to address this risk and utilize the steps available to protect both of their clients from such exposure. •