

Carnahan & Perry, PLC

Arizona Law Update

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LIEN OF HEALTHCARE PROVIDER ON DAMAGES RECOVERED BY INJURED PERSON RECEIVING SERVICES

With confusion about health-care provider liens, the Arizona Legislature recently re-wrote A.R.S. § 33-931 *et seq.* By way of background, providers, mainly hospitals, which engage in “balance billing,” were not recording liens within 30 days of service. Instead, they would take health insurance benefits and were barred by statute from pursuing patients for the balance. A request for records, especially from an attorney, seemed to be a red flag to assert a lien, sometimes months after service. The lien was usually for the balance of the remaining bill, usually far more than what was collected from insurance. (Thus arose many questions about reasonable-and-customary charges.) Despite the fact the statute and case law seemed to exempt first-party recovery, providers and their lawyers continued to pursue any recovery.

In rewriting the statute, the legislature gave licensed health-care providers lien rights for “customary charges” for care, treatment and transportation of injured persons. Such liens extend to all claims of liability or indemnity except health insurance and UM and UIM coverage. While county services are entitled to an “assignment by operation of law,” such does not extend to health insurance and UM/UIM coverage. (A.R.S. § 33-931.)

To perfect a lien, other providers must record within 30 days of treatment, or for hospitals, within 30 days of discharge. If specified, continuing treatment is subject to the lien. Providers other than hospitals and ambulance services must, to the best of their knowledge, set forth the names of those claimed by the injured person to be liable, and their insurance carriers. The claimant must mail a copy of the lien to the injured person, and providers, other than hospitals and ambulance services, must mail a copy to the person and their carrier claimed to be liable. If a provider, other than a hospital or ambulance service, does not record, their lien or assignment is invalid and may not be enforced pursuant to statute. If a hospital records, it is notice to all whether they are named. Showing further preference to hospitals and ambulance services, the legislature allowed them to record within 30 days before settlement is agreed to or judgment is paid. (A.R.S. § 33-932.)

If a lien is recorded, a release is not valid against the lien or assignment unless the holder joins in the release or executes a lien release. If the injured person has collected, the claimant may enforce the lien

against the person liable or any insurer paying all or part of the damages. (A.R.S. § 33-934.)

The claimant must commence an action to enforce the lien within two years of the entry of judgment or settlement, in the county in which the lien is filed. The holder may not recover more than the amount of its lien and no more than a defendant’s obligation under the settlement or judgment. The defendant may dispute the lien on grounds the charges were erroneous or exceed customary, or that care, treatment or transportation were not medically necessary or causally related. The court may allow reasonable attorney’s fees to the prevailing party. (A.R.S. § 33-934.)

Despite clear language of the statute exempting first-party benefits, (presumably in deference to the collateral-source rule), lien attorneys for health-care providers give indication they will pursue recovery. Whether this is ethical, let alone legal, remains to be seen. (As an aside, A.R.S. § 20-259.01(J) does allow a carrier subrogation for payments of more than \$5,000.00 of medical pay.)

With 15 counties in Arizona, several of which are not on line, and those which are months behind on filings, carriers are going to have trouble determining the existence of liens, especially given the fact counties have automatic lien rights and recording by a hospital is notice to all, even if not named. Carriers of those claimed to be liable will need to check as best they can and to quiz those injured and their insureds about care and notice of liens.

If a third-party claimant is represented, State Bar Rules make the attorney trustee of funds to which another party has an interest and require prompt payment to that person. (Rules of Professional Conduct Rule 42, ER 1.15.) The rub, of course, comes with unrepresented third-party claimants. By careful questioning of them and your insureds, you should be able to get an idea of medical care. By checking with providers and county records, you can then follow-up to determine any liens. If they exist, we suggest you inform the claimant you will pay these directly, subtracting the amount from their recovery. In addition, the Final Release and Indemnity Agreement should provide for indemnity against such claims.

Obviously, the amount at stake will determine what you do and how much. Furthermore, even if caught by a lien, issues such as “customary charges,” and necessity and causation remain open.

As always, if we can assist you in any way with lien matters, or any others, please call.