

The Legal Intelligencer

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Liens Leaving Settlements Unsettled

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When Jewis "J.J." McCoy got a settlement after he took the diabetes drug Avandia, the Kansas City, Mo., man hoped to achieve some financial stability.

He wanted to get a decent car after he had a vehicle repossessed in 2008. And he wanted to get caught up on bills. And he hoped that he wouldn't have to make the typical choice he has to make between ensuring his car is in decent shape or paying for heat in the winter or air conditioning in the summer.

But the 68-year-old retiree said that what was "like a gold mine in my situation" ended up not being so after he received an undisclosed settlement from GlaxoSmithKline for using a drug that McCoy said left him with coronary artery disease, stroke-like transient ischemic attacks and heart arrhythmia.

There were long delays in his settlement funds being dispersed to him because of the possibility that there might be a lien asserted against his settlement by a private insurer that provides Medicare benefits.

While McCoy was waiting for his settlement proceeds, McCoy said he borrowed money against the settlement with 300 percent interest being charged on three loans. McCoy said that by the time he got the majority of his settlement minus a holdback in case a lien was asserted, he had only \$800 left after he caught up on bills, paid back the loans, gave his children some money and paid his personal property taxes.

Thomas J. Preuss, a partner with the law firm that represents McCoy, Kansas City, Mo.-based Wagstaff & Cartmell, said liens cut against the ultimate goal of a plaintiffs attorney to get recovery for clients.

"You obviously want to get the most amount of money in your client's pocket as possible and you want to deal with it as timely as possible because these are people in tough spots," Preuss said.

McCoy is not alone in facing the reality that clearing up liens for health care provided by the government or by private insurers can protract the disbursement of settlement funds to plaintiffs.

"When we tell the court that a settlement has been reached we are at the very beginning of the process." said Donald C. Le Gower, an associate with Dechert practicing in the area of products liability and mass torts.

Le Gower said Dechert had cases that settled in January that are still being worked through the system to get liens cleared.

Liens also are problematic for defendants, defense counsel and plaintiffs counsel because, under the 2007 Medicare, Medicaid and State Children's Health Insurance Program Extension Act, they can face penalties of \$1,000 per day if they do not notify the federal government of liability settlements for claimants who received governmental health benefits.

If Medicare is forced into litigation to recover a lien, the government is owed double damages and interest.

Plaintiffs and defendants also are now facing the threat of litigation from private health insurers who are increasingly asserting liens themselves.

Before Plaintiffs Get Paid

Eric F. Gladbach, a partner in Reed Smith's New York office whose practice includes defending products liability actions, said he is seeing greater requests for reimbursements out of settlements from the government, quasi-governmental insurers and private insurers.

The process of resolving governmental liens also is taking longer, Gladbach said.

"We're seeing it take much, much longer than it used to take," Gladbach said. "It may be because government employees are overworked. It may be they're leveling greater scrutiny on individual claims. It may be more that there is more data for them to sort through. It may be that there is state budgetary issues."

U.S. District Judge Cynthia M. Rufe of the Eastern District of Pennsylvania, who is presiding over the Avandia multidistrict litigation as it draws to a close and who is presiding over the growing Zolofit multidistrict litigation, said that Medicare liens are not holding up settlement but holding up payments.

Michael M. Weinkowitz, a plaintiffs attorney and member of Levin, Fishbein, Sedran & Berman, said communication is key with clients.

"If you communicate with your clients and you set reasonable expectations as to when you'll be legally able to distribute money, most clients are quite good with that," Weinkowitz said. "The key for plaintiffs lawyers is setting expectations and explaining in detail why it is you can't make a distribution until a lien is satisfied."

Because of the existence of liens, defense clients sometimes may end up paying over what the cases are worth just to resolve cases because the plaintiffs will not settle for less because of outstanding liens, Le Gower said, or clients end up overpaying on discovery and motion practice because cases continue on due to liens. But in the mass torts world where inventory settlements are common, the issue of overpaying for liens does not come up as much for defendants, Le Gower said. The issue of how much recovery a plaintiff will get above and beyond any liens they owe then is between the claimants represented by the same firm and how they fall into a grid based upon their level of injury, Le Gower said.

While Medicare is much better at responding to the issue of liens than it used to be, the length of time that it takes to get a final lien demand letter from Medicare puts plaintiffs, defendants and courts in a bad position, Le Gower said.

Courts want to get cases off their dockets, defendants prefer not to have their cases out there, and plaintiffs are reluctant to dismiss their cases even though they have received promises to pay, because sometimes there are still probate issues to deal with, Le Gower said.

Plaintiffs can get preliminary estimates from Medicare for how much the liens might be asserted, but defendants are not willing to cut checks to plaintiffs until Medicare has provided final demand letters, Le Gower said.

There is so much back-and-forth between mass tort plaintiffs and the Centers for Medicare & Medicaid Services that plaintiffs lawyers on their own, or plaintiffs and defendants together, regularly retain lien administrators to do negotiations with the government.

Matt Garretson, an attorney and founding partner of claim administrator and lien administrator Garretson Resolution Group, which has worked in the Avandia litigation, the World Trade Center first-responder litigation and the BP oil spill litigation, said that when defendants became responsible parties for liens, the resolution of the liens became a "condition precedent" before plaintiffs can get paid.

Orran Brown, a principal with BrownGreer, a Richmond, Va., law firm that specializes in mass claims resolution and claims administration, said liens also can be asserted for child support, private health insurance companies, litigation lending companies like the one McCoy borrowed from, and unpaid legal fees, Brown said.

"Anything that you can imagine that creates a credit obligation comes up when there's a pot of money to be had," Brown said.

"It gums up things for a long time ... it does delay payments to claimants if you're waiting on the government to tell you" how much liens are, Brown said.

Payment also can be gummed up if there are any questions about who is the right person to receive payments for the settlement, or about who is the authorized representative on behalf of a minor or a decedent, Brown said.

A big change regarding liens is that some law firms are no longer waiting until they have settlements inked with defendants on behalf of their clients to start the lien research process, Garretson said, so that by the time the settlement finish line is approaching it will just be a matter of paperwork to get the liens resolved in 120 days after settlements are struck.

"Smart people are doing as much of this work in advance as possible," Garretson said.

Unraveling liens is a complicated affair. It's not uncommon for products liability claimants to already be sick and to have pre-existing injuries before they used a medical device or they ingested a drug, Garretson said, and they often have had multiple insurers, sometimes starting with private insurance when they first got injured and then they might have gotten turned onto Medicare, Medicaid or Medicare Advantage/Part C programs in which people have their Medicare benefits provided through private health insurance plans.

Garretson said his firm has Web portals and online systems that government employees can use to get the information about claimants in order to make decisions about liens, Garretson said.

The New Frontier: Private Liens

The latest issue regarding liens has been the assertion of liens by private insurers, especially those who provide Medicare benefits.

That was the kind of lien that was potentially at play in McCoy's case.

Gerald Lawrence, an attorney with Lowey Dannenberg Cohen & Hart, who is representing health benefit plans that are alleging reimbursement claims in litigations such as Avandia, said private lien resolution programs are "a model that's attractive to defendants because the defendants in these cases have a responsibility to ensure these liens are paid. Defendants have begun to focus on their liabilities for these claims, as have claimants and their counsel. The LRP model provides an efficient method for resolution of liens."

Usually, a period of time will be provided in a mass tort claims administration program for private insurers to substantiate their liens, but after that period has expired, the claims can be paid, Brown said.

Weinkowitz, who was one of the lead plaintiff negotiators of the private lien resolution program in the Yaz/Yasmin/Ocella birth control litigation, said such programs are becoming more typical.

"Generally, both sides, plaintiffs and defendants, see the benefits of such programs. It provides plaintiffs who voluntarily participate with certainty — they receive a substantial reduction of his or her lien and it provides a defendant certainty that liens are resolved," Weinkowitz said.

Private liens are a "complicated minefield" because plaintiffs lawyers must remain mindful of clients' contractual obligations to their insurers even if they are from states with anti-subrogation laws or states that prohibit health plans from seeking reimbursement on the basis of equitable rights, Weinkowitz said.

For McCoy, who said he had his case settle in January 2011 but did not get any of his settlement funds until this fall, it has been a case of great frustration. But McCoy also said "the law is the main perpetrator" because it set up the situation necessitating liens administration.

"We're the ones that have to suffer," McCoy said. "They just hold the money."

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