LIENS, SUBROGATION & ASSIGNMENT
(Or when do you have to put them on the check?)

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I. INTRODUCTION

Liens, subrogation and assignment are instruments by which parties are able to protect their interests in particular debts. It is imperative when handling claims that these interests be identified and protected. Failure to protect another party's interest may result in paying the same claim twice. In fact, some statutes, such as Medicare, provide for triple damages when a lien is not protected. The safest way to protect a lien is to place the name of the lienholder on a settlement or judgment draft along with the claimant's name. If a lien is disputed, it is not your responsibility to determine its validity. By placing both the claimant's name and the lienholder's name on the draft, you protect all potential interests and fulfill your obligations.

II. CLARIFICATION OF TERMS:

A. Subrogation: The right of a party secondarily obligated to recover a debt it has paid from a party primarily obligated to pay the debt. The right of subrogation itself can arise by contract, statute or under common law principals.

B. Assignment: The transfer for value of a right to recover or a cause of action. In the insurance context, this usually occurs where the insurance company makes a payment to an insured and at the same time takes an assignment of their cause of action. A true assignment transfers the cause of action to the insurance company, and it may thereafter only be pursued in the name of the insurance company.

C. Lien: The right to enforce a claim against specific property to be applied to the discharge of a specific debt. In the insurance context, this usually involves the question of when a third-party can obtain part of a settlement or judgment before it is released to the claimant or the insured. Liens can be created by law (statutory lien), contract (consensual lien) or by court made rule (common law lien). In most cases that we would deal with, the party who made the payment already has the right to enforce a subrogation interest against the party to whom they made the payment. The issue to be discussed is whether a lien in aid of that subrogation interest is enforceable against others (the insurance company) who might temporarily hold the money to be paid to the injured party.

Missouri is one of a minority of states which long ago decided that the sale of a personal injury claim should be against public policy. More recent cases have consistently held that therefore it is improper to assign a personal injury cause of action. See the landmark decision of Travelers Indemnity Company v. Chumbley, 394 S.W.2d 418 (Mo.App.S.D. 1965). That case and others that have followed it have held that public policy also forbids enforcing a subrogation right or a lien which would give you a right to another person's personal injury cause of action. The only

way to defeat this public policy is for the legislature or the courts to clearly authorize such an assignment, subrogation right or lien. Contractual or consensual liens are not enforceable in Missouri to the extent they encompass personal injury actions.

Several things must be kept in mind. The prohibition against assigning personal injury actions does not apply to property damage actions. Property damage claims can be assigned, and subrogation is unlimited. Also, the majority of other states have no limitation on the assignment of personal injury actions, and so payor companies from other states may regularly attempt to enforce a personal injury subrogation interest that would be totally unenforceable in Missouri. Finally, there is no federal public policy against assignment of personal injury claims, and the existence of federal law on any of these subjects can supersede state law to the contrary. Because of that, the ability to enforce personal injury subrogation rights can generally be divided into two area. First are state statutory exceptions, and second are those benefits which are controlled by federal law.

III. MEDICAL PAYMENTS COVERAGE, LIENS AND ASSIGNMENTS

The way that liens and subrogation is handled in liability coverages can be different than how they are treated in contractual coverages. Since 1990, Missouri Statute 376.427 has allowed an insured to assign benefits from a medical insurance policy or the medical pay coverage under a liability policy to a doctor or hospital. Upon receipt of such an assignment by the insurance carrier, payments are to be made directly to the doctor or hospital. The contractual right to receive those payments is transferred to the doctor or hospital.

An interesting question that often arises is whether or not a lien can attach to a med pay obligation. The answer is that it depends on the lien statute being asserted. The Medical Care Recovery Act, for example, applies only when the payment is being made due to the tort liability of some third party. The cases interpreting that statute have found that strictly contractual payments, like med pay, are not within the reach of the lien. The following sections will analyze the statutory language as it pertains to liability claims (including uninsured motorist and underinsured motorist) separately from MPC claims.

IV. STATE STATUTORY EXCEPTIONS

Because these state statutory exceptions are in conflict with the prohibition of assignment of personal injury causes of action, they are generally strictly construed. If the letter of the statute is not followed, no lien or subrogation right will arise.

A. DOCTOR’S LIENS: §430.225 - .250 (all statutory references are to Missouri Revised Statutes unless noted otherwise) was added in 1999. In essence it gives doctors, chiropractors and dentists the same type of lien granted to hospitals in §430.235. The requirements for asserting the lien are the same as for hospitals. There are some limitations included in the statute for those who assert such a lien, however. The aggregate of all parties asserting these liens is limited to 50% of the patient’s net recovery, and they waive any right to receive anything above that amount. Other types of liens are not limited in this way. You may only pay the lien

directly to the doctor if the claimant agrees. Otherwise, you may have to pay it into the court and let them decide.

MPC: Prior to 1999, liens were not permitted by hospitals against medical pay coverage. In 1999 the Missouri legislature enacted 430.225 R.S.Mo. allowing doctor's liens. This statute defines "claim" as "a claim of a patient for: (a) damages from a tort feasor; or (b) benefits from an insurance carrier" (Emphasis added). This statute then provides the same lien rights to doctors as is given to hospitals under 430.230 R.S.Mo. and 430.235 R.S.Mo. Under the hospital lien statute, a lien is permitted for

...any and all claims, counterclaims,...of any person admitted to any hospital, clinic or other institution and receiving treatment, care or maintenance therein for any cause including any personal injury sustained by such person as the result of the negligence or wrongful act of another, which such injured person may have, assert or maintain against the person or persons causing such injury for damages on account of such injury....

This language is not crystal clear and has yet to be interpreted by the Missouri courts. Nonetheless, it is our opinion that a lien on a "claim" is only permissible against the person causing the injury or the insurance benefits of the person causing the injury, not MPC benefits. However, because the issue is not yet decided, the safest course of action is to protect the lien if received.

B. HOSPITAL LIENS: §430.230 and §430.235 give hospitals a lien for the cost of medical care given to a patient due to injuries resulting from the tortious act of a third party. The lien is not valid on workers' compensation claims. Under §430.240, in order for the lien to be effective, there must be:

1. Written notice sent by registered mail with return receipt requested;

2. Directed to the tort feasor and his or her insurance carrier, if known;

3. Prior to the payment to the injured party.

Hospital liens do not apply in wrongful death claims. American Family Mutual Insurance Company v. Ward, 774 S.W.2d 135 (Mo.banc 1989).

MPC: The doctor's lien statute §430.225 specifically provides that all definitions apply to the hospital lien statute. As such, the definition of "claim" as including "benefits from an insurance carrier" applies also to hospital liens. As with doctor's liens, hospital liens are permitted for:

...any and all claims, counterclaims,...of any person admitted to any hospital, clinic or other institution and receiving treatment, care or maintenance therein for any cause including any personal injury sustained by such person as the result of the negligence or wrongful act of another, which such injured person may have, assert or maintain against the person or persons causing such injury for damages on account of such injury....

This language is not crystal clear and has yet to be interpreted by the Missouri courts. Nonetheless, it is our opinion that a lien on a "claim" is only permissible against the person causing the injury or the insurance benefits of the person causing the injury, not MPC benefits. However, because the issue is not yet decided, the safest course of action is to protect the lien if received.

C. ATTORNEY’S LIENS: §484.130 gives an attorney a lien upon his client’s cause of action for his contingent fee or services rendered in prosecuting that cause of action on his client’s behalf.

§484.140 states that the lien is perfected by written notice to the defendant "stating therein the interest he has in such claim." The statute specifically requires that the percentage of any contingent fee be set out. Passer v. USF&G Company, 577 S.W.2d 639 (Mo.banc 1979). The implication of the statutory scheme is that if you do not receive a lien letter which sets forth the contingent fee percentage, then the attorney has no enforceable lien. There are common law cases pre-dating the statute, however, which recognized an attorney’s lien in his client’s cause of action once an attorney had formally entered his appearance as a representative of his client. This common law lien probably still exists, so it is also necessary to assume the existence of a lien for any attorney who has entered his appearance in a lawsuit on behalf of a claimant.

A prior attorney who has been discharged by the claimant is still entitled to the reasonable value of his services not to exceed the contingent fee agreement. In that case, the fee is only payable when the client receives the settlement money or payment of the judgment. Therefore, a prior attorney may not insist on a separate payment of his fee.

MPC: You can have an attorney’s lien on an MPC claim to the extent an attorney assists in the recovery of said claim.

D. WORKERS’ COMPENSATION: §287.150.1 gives the employer who has made workers’ compensation payments under the law a subrogation interest. The second injury fund has the same type interests under §287.220.1. Although the statute does not confer an actual lien right, it gives the employer the right to file suit in its own name or to intervene in an ongoing case in order to protect their subrogation interests. The Missouri Court of Appeals has held that this interest is not true subrogation, but rather a right to indemnity and, as such, does not have to be protected by third parties. O’Hanlon Reports, Inc. v. Needles (Mo.App. 1962). In O’Hanlon an employer sued the tort feasor and the tort feasor’s insurer to recover payments made to its employee for workers’ compensation. The tort feasor’s insurer had paid the third party claim directly to the employee. The Court in O’Hanlon holds that if the employee recovers under the third party claim, he holds the proceeds in constructive trust for the employer. The Court of Appeals upheld the dismissal of the employer’s claim. While this case is now 40 years old, it is still the state of the law in Missouri.

MPC: The language of the Workers’ Compensation Act allows subrogation against third persons liable for the injury. The courts interpret this as preventing assertion of subrogation interests against health, accident or hospital insurance. Barker v.

Palmarin, 799 S.W.2d 117 (W.D. 1990). The same logic would apply to MPC payments.

E. UNINSURED MOTORIST COVERAGE: §379.204.4 gives an automobile insurer a subrogation right for payments made under uninsured motorist coverage. This has been confirmed in Kroeker v. State Farm Mutual Automobile Insurance Company, 466 S.W.2d 105 (Mo.App.W.D. 1971). In those circumstances the insured is the real party in interest and must therefore bring any subrogation suit in their own name.

MPC: By statute the subrogation interest of a uninsured motorist carrier can be asserted only against the tort feasor. As such, there is no subrogation interest against MPC payments.

F. MEDICAID BENEFITS: Both federal and state funds go into the payment of Medicaid benefits, but only the state controls the right of recovery. §208.215 gives the Department of Social Services the right to bring suit in the name of the State of Missouri. §208.215.8 specifically allows the creation of a lien against an insurance company. There must be:

1. Written notice;

2. By registered mail, return receipt requested;

3. To the attorney for plaintiff and the third party alleged to be liable; and

4. The lien must be sent prior to payment to be enforceable.

Because the lien is specifically directed to insurance companies, it can be inferred that failure to comply with the lien requirements releases the insurance company of any obligation. It could be argued that the separate subrogation suit right bestowed on the Department of Social Services may continue to exist after settlement and therefore be treated the same as a lien. However, unlike the Workers' Compensation Act, the subrogation right for Medicaid payments is against a party liable in tort to the recipient of the benefits. Once settlement has occurred, he is no longer "liable in tort," and therefore the subrogation right against him should also end. Because of the confusion in the statute, any time there is actual notice of a Medicaid interest, it is probably safest to treat it as a lien.

MPC: There is a Medicaid lien on MPC coverage. §208.215 provides that "Medicaid is the payor of last resort" and that:

The Department of Social Services shall have a lien on any moneys to be paid by any insurance company...in settlement or satisfaction of a judgment on any claim for injuries or disability or disease benefits arising from a health insurance program....

Certainly this language is not crystal clear. However, when read in context of the entire statute, it is apparent that it is intended to apply to settlements of claims for injuries against a health insurance program.

G. CRIPPLED CHILDREN'S SERVICE: §201.040 gives the Crippled Children's Service a subrogation right for payments made by the CCS to crippled children or their parents. There is no specific lien requirement, and it appears that the subrogation interests must be protected by suit prior to settlement.

MPC: §201.040 provides for a subrogation interest against entities who would be liable as a result of contract for services provided due to personal injuries. This would include MPC.

H. DEPARTMENT OF MENTAL HEALTH SERVICES: §630.205.1 gives the department subrogation rights for services provided. Vague language lets them "take any and all action necessary to enforce the subrogation rights." Again, since no lien is specifically authorized, we can assume that their subrogation rights need to be asserted before settlement.

MPC: §630.205.1 provides for a subrogation interest against entities who would be liable as a result of contract for services provided due to personal injuries. This would include MPC.

I. CHILD SUPPORT AND MAINTENANCE: §454.519.1 gives the director of the Division of Child Support Enforcement of Missouri's Department of Social Services a lien for unpaid child or spousal support upon personal injury claims of persons delinquent in their support payments. To be effective, the lien requires written notice by certified mail to the alleged tort feasor or his attorney, instructing the tort feasor to mail the notice to his insurance carrier.

MPC: The lien provided in §454.519.1 only applies to personal injury or negligence claims and does not on its face apply to contract claims.

J. CRIME VICTIM'S COMPENSATION: §595.040 authorizes the attorney general to enforce subrogation rights "to the amount exceeding the actual loss to the victim." No liens, so right must be asserted before settlement.

MPC: §595.040 gives a broad subrogation right to the attorney general for any payment made to the claimant or victim for losses from the crime with respect to which compensation under the statute was paid.

V. BENEFITS CONTROLLED BY FEDERAL LAW

Where federal and state laws are in conflict, federal law wins. Where federal law authorizes subrogation rights, assignment or liens, it is generally held to supersede contradictory state law. Because there is no federal common law prohibiting the assignment of personal injury claims, such rights are not narrowly construed, but are broadly construed so as to effect their purpose.

A. MEDICARE: 42 U.S.S. §1395y(b)(2) says Medicare should not be paid where payment has been made or can reasonably expect to be made promptly by workers' compensation, or an auto or liability insurance policy. Any payments that are made are conditioned on reimbursement. The statute talks only of subrogation and giving the right of the U.S. Government to intervene or file suit in its own name in order to

protect the subrogation right. There are a couple of cases, however, which hold that the government's right to bring suit is not necessarily terminated upon settlement if the tort feasor or his insurance company is aware of the government's interest prior to settlement. In one Florida case, it was held that medical records in the possession of the insurance company stamped "Medicare benefits applied" put them on sufficient notice of the government subrogation interest that they could not settle without protecting that interest.

MPC: Neither the Medicare statutes nor accompanying federal regulations specifically address the issue as to the applicability of the Medicare super lien to MPC coverage. Indeed, the language of 42 C.F.R. 411.26 indicates that the lien (referred to as a subrogation interest) is directed to a "third party payor" suggesting that it is directed to tort feasors or their liability insurance. However, the comments to the 1980 amendments to the Medicare statute clearly reflect that the legislature intended Medicare to be the secondary payor, not the primary payor. If it cannot assert its lien against MPC payments, it becomes the primary payor, and MPC becomes the secondary payor.

While the courts have not directly addressed the issue with regards to MPC coverage, the general proposition that Medicare is to be the secondary payor is strongly reinforced in United States v. Grier, 816 F.Supp. 1313 (W.D. Wis. 1993), which concluded that to allow a health insurance company to have subrogation rights ahead of Medicare's subrogation right would make Medicare the primary payor. In keeping with the legislative intent of the Medicare statutes, it is our opinion that Medicare liens should be protected on MPC payments until the courts direct otherwise.

B. VETERAN'S ADMINISTRATION AND MILITARY BENEFITS: 42 U.S.C. §2651(a) is the Medical Care Recovery Act. It is a general statute allowing the U.S. Government a subrogation right for any payments made "under circumstances creating a tort liability upon some third person." The statute is not specifically directed to the Veteran's Administration or any other federal government entity, but the VA and other federal organizations that do not have broad subrogation recovery statutes often rely on it. Interestingly, the statute does not apply to workers' compensation claims because such claims do not "arise from tort liability." Pennsylvania National Mutual Casualty Insurance Company v. Barnett, 445 F.2d 573 (C.A. 5, 1971). Again, this statute allows a separate suit or intervention in an existing suit by the U.S. Government. The cases, however, indicate that those rights are not exclusive and support the position that any knowledge that VA payments have been made will require you to protect the federal government's interests prior to settlement. Like most statutes conferring a lien or subrogation right, this one gives the head of the entity using the statute the right to compromise the claims if they believe it to be desirable.

MPC: The statute will not apply to med pay claims since medical pay obligations do not arise from tort liability.

C. FEDERAL EMPLOYEE'S COMPENSATION ACT: 5 U.S.C. §8131. This statute provides benefits for federal employees injured at work. The secretary of labor can force the injured employees to assign their third party rights to the United States or

the secretary can bring an action in the employee's name. Unlike most subrogation recoveries, the U.S. Government is first in line to take out their past payments and those "reasonably expected to be made in the future." The injured party and even his attorney may get nothing under this scheme.

MPC: The statute applies to injury or death caused under "circumstances creating a legal liability on a person...to pay damages" and could be interpreted to apply to medical pay claims. For this reason, all such liens should be enforced until a court would direct otherwise.

D. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA). ERISA is so comprehensive that several federal courts have found that the federal scheme has pre-empted the state's anti-subrogation laws. Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). The effect of ERISA on Missouri's anti-subrogation common law was considered in Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989). The court held that the ERISA plan might be able to subrogate to recover payments made to a plan member's child under uninsured motorist coverage of his father's policy. The case was remanded to see if the wording of the plan was sufficient to supersede Missouri's common law.

A 1990 United States Supreme Court case, FMC v. Holliday, 498 U.S. 52 (1990), clearly indicated that when an ERISA plan contains specific subrogation language, it does supersede state law, and subrogation is available. Most ERISA plans that we have seen do contain the subrogation provision, and so it is best to assume that ERISA has a subrogation right that needs to be protected until it is proven otherwise. Some insurers send letters to the plan administrators asking for copies of the plan language, which grants the subrogation right before honoring the lien.

E. OTHER FEDERAL AREAS: Other federal entities which make payments for personal injury in some form may have subrogation rights. They won't come up often, but examples are the Railroad Unemployment Insurance Act, found at 45 U.S.C. §362, and the Longshore and Harbor Workers' Compensation Act, found at 33 U.S.C. §933.