

Liens in Injury Cases and Resolving Them

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Liens are a huge part of any personal injury case, whether you are on the defense or plaintiff's side of the "v." Cases where liens are not at issue are rare. As a service to clients, I try to reduce liens as much as possible. This obviously puts more money in the client's pocket. It's important not only to maximize the settlement amount on the front end, but also to minimize any liens on the back end. Lien resolution also gives finality to the outstanding medical bills for the injured party. And it's worth noting that both the defendant and the plaintiff want the liens completely resolved.

Managing and resolving liens is an important part of our legal service to clients. Yet, it can be overlooked, an afterthought or dreaded. Because of the importance of liens, all civil files should maintain a separate lien file, where notices of liens, and all correspondence and information related thereto, are kept. That way, when the case is settled, liens are readily ascertainable. Lien files should be maintained throughout working the file.

I. GENERAL

A lien is a legal notification to us that the debt holder is asserting an enforceable interest on the proceeds of the case. A valid lien has statutory requirements to be perfected. If a lien is not satisfied the payor may have to pay the lien as well. We are only mandated to pay bills for which we have liens. Outstanding medical bills for which no lien is asserted need not be paid out of the case. But many of our clients want us to pay those out of the case; we can do them the service of negotiating the non-lien bills down and paying those out of the proceeds as well as the liens. This should be decided on a case-by-case basis.

Our typical settlement letter states that "no other medical bills are known to be outstanding." All lawyers and case managers closing cases should be sure that information is accurate. The alternative is to state that certain medical bills may remain outstanding and may remain their responsibility. In settling cases I offer, if requested, to have my client protect and indemnify for all liens. But I do often orally advise that we will pay liens and I have never had a releaser or her insurer have a problem later on.

Note that a lawyer cannot guarantee payment of liens in a settlement. The client can, but not the lawyer. Informal Opinion 125 (attached as Appendix A) from the Missouri Supreme Court advisory committee states this is a violation of ethics rule 4-1.8(e). The client has the right to instruct the lawyer not to honor the lien. *But see* Comment 8 to Rule 4-1.15 ("[a] lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when

the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved”).

II. MEDICAL LIENS

An injured individual may have outstanding bills from medical providers, or may have had insurance companies or other entities pay for medical care for the injuries caused by the defendant. Because liens can drastically affect net settlement values, deal with them head on and early. Negotiate with medical providers and lien holders to minimize their share of any settlement or judgment in a personal injury matter.

Medical providers have the legal right to place a lien on an injured individual's personal injury claim for medical care provided to treat injuries sustained from that accident. If the medical care is for another accident, no lien right is provided by statute. If a medical provider does not provide a formal written notice of lien to the liability insurance company, there is no lien and the financial obligation is left to the injured individual.

Mo.Rev.Stat. §430.225.3 provides that medical lien holders can only get up to 50% of the net proceeds to the client after attorney's fees and expenses are taken out of the recovery. Illinois has a similar statute, 770 ILCS 23/10, but classifies the bills between health care professionals and medical providers. And these statutes say that their entire recovery is limited to that afforded in the statute – they cannot sue for more later. My amazing paralegal Casey Fluegel developed Excel spreadsheets to calculate these all out. We send cover letters to lienholders and we advise them of what they are bound to take to fully satisfy the lien. See Appendix B, attached, for pure gold – cover letter and spread sheets for Illinois and Missouri. See section III infra for more detail on this.

So, if the liens are really high, this provision can be used to cap all liens, and then make a pro rata distribution among the lien holders. This happens when damages are high but there is a lower policy limit. The client gets a great benefit from settling, getting some money, and having all the debts washed away. The other trick we do is to write to all providers and ask them to assert a lien – so that we can, in turn, reduce all the bills. And when we do not have the time, we just put all the providers in there as lien holders (and the health insurance) and tell them that they have to take what we say. We also have savvy lienors who try with withdraw their lien or saw it was not perfected if they see a statutory reduction coming.

Liens should begun to be negotiated prior to settlement of the case. When the numbers are fluid and the Defendant's offer is still low, your negotiating position is quite strong. You have to balance the amount of charges, the quality of the service to your client, your integrity, the size of the settlement and other factors.

Different organizations have different styles regarding reducing bills. Some are very easy to do, and some are hard. Each one has different administrative protocols, or hoops, to jump through. They request different information, have different types of reductions they are willing to take and respond differently. If they are too unfair, you

can always adjudicate the lien with a motion to the trial court. Some lienholders ask you to, or force you to, provide information about the exact attorney's fees and expenses, other medical bills etc and exact details of recovery. If they start asking whether you reduced your attorneys' fees they are trying to start a fight.

Client expectations are an important factor in the reduction negotiation. If a client has an expectation of a certain amount of net money they will receive after attorney's fees and costs, reduction of bills and liens is a way to arrive at that figure. Do not over promise and underperform with liens. You would rather the client get surprisingly more money in their pocket than the reverse.

Some Arguments to Use:

- a. The provider typically will have a contract with the insurance company to get paid 1/3 to 2/3 of the amount charged – so give us that reduction. Their bill isn't a true reflection of the value of the service – pre-Deck litigation addressed this;
- b. Lien reduction statute;
- c. It was a difficult case, patient had to hire lawyers to obtain recovery, and the lienholder should pay us for that – lienholder is effectively getting a collection attorney for free;
- d. Tough liability and our client is reducing his recovery because of that and is being undercompensated - our client is not getting much money;
- e. Other lien holders are reducing liens, liability is very difficult, there are caps on insurance recovery, and other extenuating factors in this case which justify a reduction (there will be these factors in every case); and
- f. We're trying to get this settlement done and are calling the lien holders to try to get reduction to see if we can settle the case. No settlement, no payment to them.

Be careful not to overreduce or be unfair to medical providers because they have given great service to your client.

Liability insurance companies regularly devalue chiropractic medical care in evaluating cases. When chiropractor bills are paid by health insurance, they are closely screened with less treatments authorized and less cost per treatment than may appear on the chiropractic bill that has been presented to the attorney.

An attorney may want to contact the chiropractor and inquire about a marginal reduction in the chiropractic bill, which is a savings that can be passed along to the client/patient. In fact, some insurance claim agents have an expectation that the chiropractor bill will be reduced after settlement and negotiate the case with that view.

Whether explicit or implicit, chiropractor bills are just not valued by insurance companies as highly as other types of care.

Note that if medical bills have already been paid by insurance and the medical provider is trying to retrieve additional money from us, they can not. They have a contract with the insurance provider to charge the contract rate for their services and they have contractually agreed not to seek more from the insured (injury plaintiff). The injured party paid the health insurance premiums and is a third party beneficiary to that contract.

If there is no insurance, the medical provider is entitled to get paid. For a time, St. Anthony's was paying back health care companies if they found out the person had good case and tired to seek full payment in the lawsuit.

Although it has only been rarely done in our office, ultimately, we do have a right to file an action for the court to judicially determine the validity and amount of liens in a case. The simplest and most common vehicle to reduce the lien in court is a motion to adjudicate lien, filed as a motion in the same overall tort suit – even if the suit has settled. Although, the movant will want to properly provide notice to the lienholders. Often the lienholder does not attend and acquiesces in the requested reduction.

III. The Missouri Hospital Lien Statute

The Missouri Hospital Lien Statute, Mo. Rev. Stat. Sections 430.225 through 430.250, provides the medical provider a way to guarantee payment from the tortfeasor's insurer. To fully avail itself of the lien offered by the Statute, a medical provider must properly give notice of the lien. But to whom? In describing the manner in which notice is to be given, Section 430.240 states that it is the tortfeasor or his insurer who is to be placed on notice:

“No such lien shall be effective, however, unless a written notice containing the name and address of the injured person, the date of the accident, the name and location of the hospital and the name of the person or persons, firm or firms, corporation or corporations alleged to be liable to the injured party for the injuries received **shall be sent** by certified mail with return receipt requested **to the person or persons, firm or firms, corporation or corporations, if known, alleged to be liable to the injured party, if known, for the injuries sustained prior to the payment of any moneys to such injured person, his attorneys or legal representative, as compensation for such injuries.** Such hospital shall send by certified mail with return receipt requested a copy of such notice to any insurance carrier, if known, which has insured such person, firm or corporation against such liability.”

With proper notice given to the tortfeasor and/insurer, if the tortfeasor/ insurer pays out the settlement proceeds to the Plaintiff without compensating the hospital lienholder, Section 430.250 provides the only recovery mechanism for the lienholder.

Cf., *Huey v. Meek*, 419 S.W.3d 875, 881-82 (Mo. Ct. App. W.D. 2013) (“The 2003 amendments to the hospital lien statute provide an exclusive remedy for health care providers to seek payment out of the proceeds of the personal injury claims of their patients...”). The lienholder has one year after the date of the settlement ***to pursue the tortfeasor or his insurer:***

“Any person or persons, firm or firms, corporation or corporations, including an insurance carrier, making any payment to such patient or to his attorneys or heirs or legal representatives as compensation for the injury sustained, after the receipt of such notice in accordance with the requirements of section 430.240, without paying to such hospital the amount of its lien or so much thereof as can be satisfied out of fifty percent of the moneys due to such patient under any final judgment or compromise or settlement agreement after paying the amount of attorneys' liens, federal and Missouri workers' compensation liens, and any prior liens, shall have a period of one year, after such settlement is made known to the hospital, from the date of payment to such patient or his heirs, attorneys or legal representatives, as aforesaid, be and remain liable to such hospital for the amount which such hospital was entitled to receive, as aforesaid, and any such association, corporation or other institution maintaining such hospital may, within such period, enforce its lien by a suit at law against such person or persons, firm or firms, corporation or corporations making any such payment.”

In summary, medical providers seeking to avail themselves of the Statute, must properly put the tortfeasor or tortfeasor’s insurer on notice. If the tortfeasor or his insurer pay on the personal injury claim without compensating the hospital lienholder, then the Statute creates the exclusive remedy by which the lienholder may pursue the tortfeasor or his insurer – but not the plaintiff...or his attorney. Cf., *Truman Medical Centers, Inc. v. McKay*, 505 S.W.3d 799 (Mo. Ct. App. W.D. 2103) (lienholder cannot pursue plaintiff’s attorney).

Section 430.225 consists of a definitions section. It also includes the lien-reduction provision attorneys are most familiar with, (Section 430.225.3) which states:

“If the liens of such health practitioners, hospitals, clinics or other institutions exceed fifty percent of the amount due the patient, every health care practitioner, hospital, clinic or other institution giving notice of its lien, as aforesaid, shall share in up to fifty percent of the net proceeds due the patient, in the proportion that each claim bears to the total amount of all other liens of health care practitioners, hospitals, clinics or other institutions. "Net proceeds", as used in this section, means the amount remaining after the payment of contractual attorney fees, if any, and other expenses of recovery.”

Importantly, Section 430.225.5 releases plaintiffs from debt liability on medical bills, if the medical provider avails itself of the Statute:

“Any health care provider electing to receive benefits hereunder releases the claimant from further liability on the cost of the services and treatment provided to that point in time.”

There are no cases directly interpreting 430.225.5. However, a case from 2002 restates the thrust of the statute, in dicta:

“The new section 430.225 also provided that if a healthcare provider elected to receive payment under the new hospital lien law, then it must release the claimant from further liability for the cost of services and treatment provided up to that point in time and could not pursue the patient for any remaining unpaid charges.”

SSM Cardinal Glennon Children’s Hospital v. State, 68 S.W.3d 412, 415 (Mo. banc 2002).

Section 430.230 sets out the right of medical providers to assert a lien on a personal injury claim. Similarly, Section 430.235 simply reiterates the previous Section, and applying the applicability to medical benefits paid to public assistance recipients.

N.B.: Hospital liens under Mo. Rev. Stat. §§ 430.230 through 430.250 do not apply to wrongful death claims. *American Family Mut. Ins. Co. v. Ward*, 774 S.W.2d 135 (Mo. 1989); *St. Anthony’s Medical Center v. Metze*, 23 S.W.3d 692 (Mo. Ct. App. E.D. 2000).

IV. HEALTH INSURANCE LIENS

Many times, a health insurance company or other payor of medical bills of the plaintiff will seek a subrogation lien against money obtained from a third party based on that same medical care. It is against Missouri public policy for a party who has paid for medical treatment for an injured individual to assert a subrogation interest if that individual pursues a claim for damages for those same medical costs against a third-party. *Schweiss v. Sisters of Mercy, St. Louis*, 950 S.W.2d 537 (Mo.App. 1997). Appendix C. The Missouri court’s consider this assigning part of the personal injury claim. However, if health care payor is governed by the Employment Retirement Income Security Act (“ERISA”) or is Medicaid or Medicare, it may contractually agree with the injured individual that if they recover third-party damages for medical treatment for which the payor paid benefits, the payor is entitled to recover those payments from the injured individual as a subrogation interest.

To be entitled to a lien, there must be a provision in the plan documents, or summary plan documents, that gives the plan the right to subrogate against a third-party recovery for health insurance coverage.

As a general rule, you still want to send all client treatment through the health insurance company even if they ultimately have a right of subrogation. So, if a health insurance company asserts a lien, you will want to:

- (1) send them a letter asking if they are an ERISA-governed policy and send a summary plan description so stating. If you want to be more aggressive, request the name, address, and phone number or other contact information of the plan trustee and the plan administrator and ask them to provide a copy of the plan, subrogation terms and ERISA terms;
- (2) if they are an ERISA policy, send them a letter requesting the plan language which gives them a subrogation right – you would be surprised when that's not in there; and
- (3) if a lien right is verified, negotiate the lien down.

If an insurance company asserts a lien, an attorney should advise the lienor that proof is needed that the insurance company is governed by the Employee Retirement Security Act of 1974 (ERISA), which is powerful. In *U.S. Airways v. McCutchen*, 133 S.Ct. 1537 (2013), the Supreme Court ruled that ERISA section 502(a)(3) says that reimbursement plans are controlled by the terms of the plan and that equitable arguments cannot trump the plan language if it entitles the plan to full reimbursement. Ow.

But absent such proof it's an ERISA plan, the attorney should deny the validity of the liens and advise the lienor of such denial. If the lienor is not an ERISA plan, an attorney should not satisfy the lien unless requested to do so by the client. Should the lienor assert a non-ERISA lien, they should be advised that the lienor should pursue some type of declaratory judgment or other legal action to assert that lien.

If the case is settled with a lien issue pending, the client should be so advised. An attorney may wish to leave the disputed sums in her trust account for a period of time to give the lienor a reasonable opportunity to pursue any legal action to assert a lien. After a reasonable time to pursue the claim has elapsed, the remaining trust money should be paid out by the attorney to the client.

Use the same negotiating tactics on issues as addressed above where applicable. The size of the lien for health insurance can greatly impact the case. Be especially guarded about whether or not a valid lien exists. Points to stress are that we went and got this money for them, and they should take 1/3 off. It is more difficult to get health insurance companies down to a 50% reduction. Sometimes they may only give a 20% reduction. This kind of depends on the size of the settlement, the size of the lien, and various factors. Sometimes they will require further information than a medical lien holder. Sometimes, where the lien is big and it's a difficult negotiation, lawyers should handle this personally. The more the lien is reduced the more your client gets in their pocket.

It is important to start talking about liens before the resolution of the case. If you wait until after the case is settled, and they start asking what the numbers are in terms of the settlement are, you are in a worse negotiating position. It is much better to use the earlier, lower settlement offers from the Defendant as the number to which settlement will likely be targeted. Fax the lien holder a copy of the Defendant's letter offering a low amount of money. It is very important that updated information be obtained on the amount of money being asserted on the lien. Many times, we will have a file that shows a \$500.00 lien, but when we call up, it is \$1,200.00 because additional medical has been attached to the lien, which they can do. Talk to the lien holders and get their agreement before the deal is done. Then, you also really know what the client is going to get in his pocket. Significant changes in the lien holder's position in a case can make a settlement doable, where it would otherwise not be. Get the check, put it in your trust account, issue checks to the different lien holders. I do not have them sign formal agreements or agree to the lien, but I have form letters that go with the checks, that confirm the agreement in writing regarding the resolution of the lien.

Although we speak of "arguments" to use in negotiating liens, we are really just presenting the reality of the case. Some personal injury cases are not going to get a lot of money, and if that case has a lot of liens, it is going to be difficult to settle. I consider negotiating liens very important in a case and a very important service to our clients. I cannot tell you the number of times where I have put a lot more money in a client's pocket than they thought they would get.

Every lawyer should start looking at liens and negotiating long before settlement. Pull the file, grab the lien file, look through it and make sure that all the liens are in the lien file, start calling the lien holders and initiating lien reduction negotiations.

Here are some more recent ERISA developments. The United States Supreme Court held that an ERISA healthcare benefit plan with reimbursement rights can only obtain "appropriate equitable relief" when enforcing its lien against a third-party settlement, thus limiting the plan's recovery to settlement funds still held by or on behalf of the participant:

We hold that, when a participant dissipates the whole settlement on nontraceable items, the fiduciary cannot bring a suit to attach the participant's general assets under [ERISA] §502(a)(3) because the suit is not one for "appropriate equitable relief."

Montanile v. Bd. of Trs. of Nat'l Elevator Industry Health Benefit Plan, 577 U. S. _____, No. 14-723 (Jan. 20, 2016).

Under ERISA Section 502(a)(3), a civil action may be brought by a plan participant, beneficiary or fiduciary to enjoin any act or practice that violates any provision of Title I of ERISA or the terms of the plan, or to obtain other "appropriate equitable relief" to redress such violations or to enforce any provisions of Title I or the terms of the plan.

Montanile is yet another Supreme Court case that interprets the meaning of "appropriate equitable relief," following *Mertens v. Hewitt Associates*, 508 U.S. 248

(1993); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006); *CIGNA Corp. v. Amara*, 563 U. S. 421 (2011); and *US Airways, Inc. v. McCutchen*, 569 U. S. ____, 133 S. Ct. 1537 (2013). *Montanile* continues the Court’s narrow interpretation of “appropriate equitable relief,” limiting such relief to “those categories of relief that were *typically* available in equity” before 1938 when the Federal Rules of Civil Procedure were adopted when courts of law and equity were separate and “legal remedies” and “equitable remedies” were strictly defined.

In *Montanile*, the Supreme Court makes clear that even if an ERISA healthcare plan has a right to reimbursement and a lien against a participant’s personal injury settlement, the plan has no claim against the participant’s general assets (which would be a *legal* remedy) but only an *equitable* claim against the settlement “fund,” which disappears if the settlement proceeds are dissipated by the participant. See Appendix D for a great article on additional Tips for Negotiating ERISA Liens in PI Cases.

Warning – Carpenter’s Union is tough and will not negotiate their liens down. They have a good argument – Everything they collect goes to paying for health insurance for other members. See Appendix E for a denial letter from Carpenters.

Two ERISA success stories:

I thought I would share three pretty amazing ERISA subro success stories. In Anthony Castro’s case, we reduced an ERISA lien in state court on a Motion to Adjudicate Lien. Attached as Appendix F is the Motion to Adjudicate Lien, Order and correspondence with OPTUM. They would only reduce his lien by 10 % and we had asked for 20%. It wasn’t a huge lien (\$1,820) but my client’s dad has fixed my and my family’s cars for many years and he is a great guy. I argued that the inherent power of the court to resolve liens asserted in a case pending before it gave jurisdiction to rule on the motion and obtained a court order reducing the lien by 50%.

In representing Cynthia Cooper, we successfully reduced a lien from \$76,193 to only \$165 because we were able to show much of the medical care in the lien was not related to what we were suing for and was for preexisting conditions. Attached in Appendix G are some letters (and quoted bad case law for me) reflecting that matter. Attached in Appendix H are some letters in two other cases where we reduced liens.

V. MEDICARE/ MEDICAID LIENS

Medicare/Medicaid liens are the most significant liens to deal with in any case.

To address a Medicare lien, do the following:

1. Evaluate the file and see if Medicare payments have been made, including review of medical bills, review of notes, and talk to the client about whether they have Medicare.

2. In any case where Medicare is suspected, have the client sign a 'Proof of Representation' form and mail or fax it in to Medicare (MSPRC). This gives them authority to discuss the claim with our office. With this form, enclose a cover letter requesting the issuance of a 'Conditional Payment Letter'. This should be done sooner, rather than later, as they take some time to respond.
3. Medicare's system will automatically generate a 'Rights and Responsibilities' Letter. This should come within a few weeks. If it has not been received, it may be necessary to call MSPRC and make sure they have received the Proof of Representation and have knowledge about the claim. Rights and Responsibilities letter looks like a form that needs to be filled out. It does NOT need to be filled out.
4. The Conditional Payment Letter should automatically generate 65 days after the request and Proof of Representation was received. When the Conditional Payment Letter is received, always review the list of providers to make sure all payments listed are related to our case. If they are not, now is the time to dispute them. You will need to send a letter indicating which charges are not related to this claim if that applies.
5. When a case settles, IMMEDIATELY submit a 'Final Settlement Detail'. This outlines the attorney's fees, expenses, settlement amount, etc. Within 60 days of receiving this info, Medicare should issue a 'Final Demand'. At this time, it is ok to pay them and no longer necessary to hold money in trust.

Attached as Appendix I is a Proof of Representation Form and a Final Settlement Detail Document. The client will also get a copy of any letter that is sent by Medicare.

Medicare's Contact Information:

Medicare Second Payer Recovery Contractor
MSPRC-HGHP
PO BOX 138832
Oklahoma City, OK 73113

MSPRC: 1-800-677-7220
MSPRC Fax 800-869-3309

To address a Medicaid (MO Health Net) lien, do the following:

1. Evaluate the file and see if Medicaid payments have been made, including review of medical bills, review of notes, and talk to the client about whether they have Medicare.
2. In any case where Medicaid is suspected, send a letter advising of your representation along with a sign HIPAA release authorization requesting an itemized statement and current lien amount.

3. Medicaid will provide this information. Once this letter and information is received, always review the list of providers to make sure all payments listed are related to our case. If they are not, now is the time to dispute them. You will need to send a letter indicating which charges are not related to this claim if that applies.
4. If your case has settled and your itemized statement is correct then you are ok to pay the amount requested by Medicaid. If the itemized statement is incorrect you will need to wait for the updated correspondence from Medicaid to be received with the final lien amount.

Medicaid's Contact Information:

Missouri Department of Social Services
Division of Medical Services
Third Party Liability Unit
P.O. Box 6500
Jefferson City, MO 65102-6500

MO Health Net Division: 573-751-3425

N.B.: Mo. Rev. Stat. § 208.215 sets out certain lien rights that arise when a welfare recipient of the Missouri Department of Social Services recovers for personal injuries, disability, or disease of the recipient. The words "death" or "wrongful death" do not appear in the statute and there is no relevant Missouri appellate opinion. This lien statute was recognized but made inferior to the attorney's lien statute Mo. Rev. Stat. § 484.130 in *Ganaway v. Department of Social Services*, 753 S.W.2d 12 (Mo. Ct. App. W.D. 1988).

VI. WORKERS COMPENSATION LIENS

If a person is injured in the course and scope of their work, they have a claim under Missouri's Workers' Compensation Act. As a general rule, it is usually better to settle the workers' compensation case, and then settle the civil case. Mo. Rev. Stat. § 287.150 gives the employer and/or its insurance carrier a subrogation interest in the claim against the third-party tortfeasor for recovery of paid compensation benefits. That lien is determined by a formula first set forth in *Ruediger v. Kallmeyer Brothers Service*, 501 S.W.2d 56 (Mo.banc. 1973), and later codified.

Just like with other liens, even once the compensation lien has been reduced by *Ruediger*, an attorney may also wish to try to negotiate the compensation lien down to an even lower amount to facilitate settlement and/or maximize her client's recovery. If the civil case is settled before the compensation case, the entire amount of the civil settlement will be a setoff in the workers' compensation case, and may swallow any recovery – as workers' compensation benefits are usually lower. Note, however, each

case is different and those differences may necessitate tactics different than the general recommendation to resolve the compensation case first.

Notably, workers' compensation liens only attach to recovery from third party tortfeasors. A work comp subrogation lien does not apply to uninsured or under insured insurance proceeds. Uninsured and under insured coverage is a contractual right of the injured party which with an insurance company, it is not a recovery against the third-party under Missouri Statute or interpretive case law. *Barker v. Palmarin*, 799 S.W.2d 117 (Mo.App. 1990), See *Barker v. H&J Transporters, Inc.* 837 S.W.2d 735 (Mo.App. 1992).

To determine the amount of the work comp lien:

1. Total amount paid in Worker's Compensation _____
2. Total amount paid in civil claim _____
3. Divide line 1 by line 2 and write here: _____
4. Take line 2, subtract attorney's fees and costs – write here _____
5. Multiply line 3 times line 4 = subrogation amount owed _____

An insolvent insurer cannot pursue a subrogation interest under MIGA (Missouri Property & Casualty Insurance Guarantee Association).

1. Comp claim must settle first. And this is better for your client.
2. The attorney fee is taken out of the subro claim. The employer's subro interest is reduced if your contract provides that all expenses apply to both the workers' compensation and the civil claim – and they are to be paid from the civil claim. A higher fee in the civil claim reduces the subrogation interest.
3. The Employer/Insurer's subrogation interest includes the amount paid in medical.
4. A spouse's loss of consortium settlement arising out of the third-party claim can be protected from subrogation. The Court of Appeals approved a third party wrongful death settlement where \$2,000.00 was for the Claimant's death count and \$166,000.00 was for the pre-death loss of consortium claim of Claimant's widow. See *Bridges v. Van Enterprises*, 992 S.W.2d 322 (Mo.App. S.D. 1999). Be certain that any independent settlement is proportionate and reasonable or you may run the risk of subrogation applying to the proceeds of that settlement. In the Bridges case, the settlement was equitable because the Claimant died after 2 1/2 years in a coma and left a spouse and nine-year-old child.

5. When calculating subrogation, comparative fault must be determined by the trier of fact and a settlement for an amount less than a verdict DOES NOT annul the findings of comparative fault. *Kerperien v. Lumberman's Mutual Casualty Co.*, 100 S.W. 3d 778 (Mo. Banc 2003). Comparative fault, once found, factors into the calculus, regardless of whether or not the agreed upon settlement occurs after the jury verdict. The Employer's subrogation interest is determined by the amount actually received in the third-party action, not the amount of the judgment. The court set out the formula to be used per Mo. Rev. Stat. §287.150.3:

- (1) Calculate the employee's net recovery:

Gross Recovery (GR) – Attorney's Fees (AF) – Expenses (E) = Net Recovery (NR)

- (2) Determine the ratio contemplated in the statute:

Employer's Payment (EP) / Total Amount Recovered or Total Damages (T) = Ratio (R)

- (3) Apply the ratio to the net recovery to determine subrogation amount:

(NR) x (R) = Amount Due to the Insurer

100 S.W.3d at 780.

In *Kerperien*, the total amount recovered at trial was \$2,500,000. The post-verdict settlement was \$1,175,000. The jury found comparative fault. The Court found the correct calculus was as follows:

Step One

\$1,175,000 (GR) - \$470,000 (AF) & \$31,505.80 (E) = \$673,494.20 (NR)

Step Two

\$116,192.53 (EP) / \$2,500,000 (T) = .04647701 (R)

Step Three – Amount Owed to the Insurer

\$673,494.20 (NR) x .04647701 (R) = \$31,302

6. When a tortfeasor's insurer is insolvent, any insurer who has paid a claim that would ordinarily entitle it to subrogation will not be reimbursed by MIGA (Missouri Property and Casualty Insurance Guaranty Association) and no one

may recover the subrogation amount from the tortfeasor of the insolvent insurer under section 375.776.2 R.S.Mo.

VII. FEHBA LIENS

A recent case which originated in St. Louis was overturned by the United States Supreme Court on April 18, 2017. The case, *Coventry Health Care v. Nevils*, involved a federal employee Plaintiff who received health benefits for an injury. The Plaintiff's health coverage was governed by the Federal Employees Health Benefits Act (FEHBA).

Nevils settled the personal injury claim. The health insurer demanded its money back for health benefits it provided. Nevils argued that Missouri law did not allow subrogation from settlement in personal injury cases and that FEHBA did not preempt Missouri law. Missouri law has long held a persona cannot assign their injury case to another person (or health insurance company).

The Missouri Supreme Court agreed, and the case advanced to the U.S. Supreme Court. After a few other procedural hurdles, the U.S. Supreme Court unanimously ruled this month that the FEHBA did in fact preempt Missouri state law.

Plaintiffs with personal injury cases in Missouri covered by a FEHBA plan have to pay back their insurers. This is bad as plaintiffs are already undercompensated in many cases, and this will just exacerbate this. Injured people pay premiums for years for health insurance coverage and should not have to pay back insurers.

VIII. ATTORNEY LIENS

There are two attorney lien statutes:

- Mo. Rev. Stat. § 484.130 is a general section which grants a lien from the time of commencement of a suit or counterclaim to cover compensation pursuant to an agreement, express or implied, which is not restrained by law.
- Mo. Rev. Stat. § 484.140 is a special statute which is restricted to contingent fee contracts whereby compensation of an attorney is limited to a portion or percentage of recovery and is contingent on successful resolution of the client's claim by either settlement or suit. The statute requires that the plaintiff's attorney provide defense counsel with notice of the lien. This is why it's a good idea to send a lien letter at the start of the case to the defendant and/or his insurer.

“In all suits in equity and in all actions or proposed actions at law, whether arising *ex contractu* or *ex delicto*, it shall be lawful for an attorney at law either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage

after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as herein provided between such attorney and his client.”

Mo. Rev. Stat. §484.140.

If a lawyer finds himself in the unfortunate position of enforcing a lien against a client, an important first step is to consult Rule 4-1.5(f):

“When a fee dispute arises between a lawyer and a client, the lawyer shall conscientiously consider participating in the appropriate fee dispute resolution program. This does not apply if a fee is set by statute or by a court or administrative agency with authority to determine the fee.”

Missouri courts have recognized that “an attorney is not restricted to any particular remedy for the foreclosing of his lien. He may proceed by an independent suit against the party who was the defendant in the original case.... Or he may proceed against the same party *by motion in the original case.*” *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 56 (Mo. banc 1982) (citations omitted).

An action for an attorney’s lien is one in equity, rather than at law. *Fein v. Schwartz*, 404 S.W.2d 210, 228 (Mo. App. 1966). In making the determination of whether or not it would be unjust to permit the enriched party to retain the benefits, the court uses equitable principles in considering the various factors surrounding the relationship such as change of position, hardship, unreasonable delay, unclean hands, bad faith, and other equitable principles of defense. *Farmers New World Life Ins. Co., Inc. v. Jolley*, 747 S.W.2d 704 (Mo. App. W.D. 1988). Thus, a client-Plaintiff may assert equitable defenses against the attorney’s asserted lien. As an attorney’s lien is grounded in equity – not law – Plaintiff has at her disposal a myriad of equitable defenses. We have litigated these issues in the past and can forward other briefs to you.

“An action sounding in quantum meruit is based upon a persons’ implied promise of reasonable and just compensation in return for the performance of valuable services, performed at that person’s behest or with his approval.” *Turpin v. Anderson*, 957 S.W.2d 421, 427 (Mo. App. W.D. 1997) (citing *Reid v. Reid*, 906 S.W.2d 740, 743 (Mo. App. 1995)). The party asserting the right to attorneys’ fees in quantum meruit bears the burden of proving the reasonable value of services performed. *Id.* Recovery is limited to “the reasonable value of services rendered, not to exceed the contracted fee, and payable only upon the occurrence of the contingency...” *Plaza Shoe Store, Inc. v. Hermel, Inc.*, 636 S.W.2d 53, 60 (Mo. 1982). In all cases relating to quantum meruit, the services must have enriched the client in the sense of benefits conferred. *International Materials v. Sun Corp.*, 824 S.W.2d 890, 895 (Mo. 1992). “An unjust enrichment quantum in a case may be nothing if the actual value to the client was none.” *Id.* The failure to prove reasonable value is fatal to a quantum meruit claim. *Reid v. Reid*, 950 S.W.2d 289 (Mo. App. 1997) (vacating an award of \$65,000).

The attorney seeking enforcement must present evidence that his work on the plaintiff’s case enriched the latter’s claim. This burden is squarely on the attorney’s shoulders as he asserts the right to attorney’s fees. Any failure to prove reasonable value bestowed upon Plaintiff’s case is fatal to any quantum meruit recovery he seeks.