

# LIENS AND DISBURSEMENTS AND THEIR IMPACT ON THE SETTLEMENT PROCESS

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In order to evaluate any settlement proposal in a personal injury action, an attorney must determine whether he will be required to disburse any part of the settlement proceeds to a third party who either provided or paid for his client's medical treatment. Generally, the attorney should know the answer to the following questions:

- 1) Have any of the client's medical or hospital bills relating to the injuries been paid?
- 2) If so, were these bills paid by any of the following sources:
  - a) Medicare?
  - b) Medicaid?
  - c) Worker's Compensation insurance?
  - d) An employer's self-funded health benefits plan?
- 3) If so, how much was paid by each source?
- 4) Have any of the health care providers whose bills are unpaid notified the attorney of a claim of lien on the settlement proceeds?
- 5) Is the client currently eligible for Medicaid benefits, or is he likely to become eligible for such benefits in the future?

Obtaining the answers to these questions will require diligence and patience, but until the answers are known, the attorney will be unable to advise the client as to how the settlement proceeds will be disbursed. The goal, of course, is to enable the client to make an informed decision concerning settlement. Clients do not react favorably when the amount of the settlement proceeds disbursed to them is less than expected.

This manuscript will review the general rules pertaining to the most common lien and reimbursement issues attorneys encounter in the settlement of personal injury actions.

## I. MEDICARE

Medicare is essentially a health insurance program funded by federal tax dollars. Medicare provides for the payment of certain medical expenses by persons over the age of 65 or persons with a disability. It is not a means-based program. Medicare benefits are divided into two parts: Part A provides primary hospital insurance benefits and Part B provides supplementary medical insurance for physician's fees and other services outside a hospital setting.

When a Medicare beneficiary has a claim for medical expenses covered by another party's liability insurance, Medicare is considered a secondary payer. Medicare is responsible for paying covered medical expenses only after the liability insurer, which Medicare deems the primary payer, has made payment. If payment by the liability insurance carrier cannot reasonably be expected to be made promptly (which, of course, is usually the case), then Medicare may pay covered medical expenses, conditioned on reimbursement from the proceeds of the liability settlement. This advanced conditional payment gives Medicare the right to recover its payments when a beneficiary receives payments from the liability insurance. Medicare's right of reimbursement is set forth in 42 U.S.C. § 1395 y (b) (2).

If a liability insurance payment has been received by a Medicare beneficiary, Medicare has a right to recover its medical payments from any entity involved in the settlement, including the beneficiary or his attorney. Medicare may withhold future payments to offset the amount of its unpaid lien. 42 C.F.R. § 411.24 (d). If Medicare has to institute legal action to recover its lien against a Medicare recipient, then Medicare is entitled to double the lien amount. 42 U.S.C. § 1395 y (b) (3) (A); 42 C.F.R. § 411.24 (c) (2).

If any of the client's medical expenses relating to the injuries at issue have been paid by Medicare, the attorney should notify Medicare of his representation as soon as possible and request a statement of these payments. This statement should be reviewed carefully since it may also contain expenses not related to the injuries.

Medicare allows a pro-rata reduction in the amount of its lien based on attorneys fees and the costs incurred in order to achieve the award. 42 C.F.R. 411.37 (c) and (d). This procurement reduction is automatically applied when applicable. Medicare's lien must be reduced by its share of attorney's fees and expenses associated with the prosecution of the disputed claim. These expenses must be documented, and the fees must not exceed the prevailing fees in the area for similar cases. 42 C.F.R. § 411.37.

Medicare will not participate in settlement negotiations concerning the liability claim and will not send a representative to mediated settlement conferences. Once a settlement is reached, the attorney is required to send the settlement statement to Medicare, detailing the terms of the settlement and any procurement costs. Medicare will then send its demand letter. An attorney who fails to inform Medicare of a liability settlement jeopardizes his attorney fee. 42 C.F.R. § 411.26.

Medicare is authorized to compromise its claim on settlement proceeds. The attorney

may request a compromise if he believes that the amount of a settlement is not sufficient to satisfy all the needs of the various parties, including Medicare, attorney's fees, and the plaintiff. The attorney must request a compromise in writing. Medicare will then forward an Overpayment Recovery Questionnaire.

The criteria that Medicare uses in evaluating a request for compromise include:

- 1) Whether or not the cost of the collection process justifies the effort, based upon the amount of the claim;
- 2) Plaintiff's ability to pay within a reasonable time, and;
- 3) The chances of unsuccessful litigation that may make a compromise advisable.

Medicare is not required to compromise its lien even if the settlement is shown to be less than the full amount of damages sustained by the injured. *Zinman v. Shalala*, 67 F.3d 841 (9<sup>th</sup> Cir.1993). Medicare should reduce its lien in cases where otherwise it would be against "equity and good conscience." 42 C.F.R. § 1395 gg (c); 42 C.F.R. § 411.28.

Medicare may waive its lien in the case of an individual claim if the waiver is in the best interest of the program. 42 U.S.C. § 5 y (b) (2) (B) (iv); 20 C.F.R. § 404.506. A request for a waiver may be submitted after Medicare has notified you of the actual amount due.

## **II. MEDICAID**

Medicaid provides for a program of medical assistance for certain low income individuals and their families. The Medicaid program is based primarily on need, while the Medicare program is based on age and disability. Medicaid is jointly financed with federal, state and local funds and is administered by state agencies.

When there are also potential sources of payment for a recipient's medical expenses, such as liability insurance, Medicaid is the payer of last resort. If Medicaid pays any medical expenses and the recipient later obtains a liability settlement based in part on these expenses, Medicaid is subrogated to the rights of the recipient to receive such settlement. Medicaid's recovery is limited to one-third of the gross amount recovered. N.C.G.S. § 108 A-57.

N.C.G.S. §108 A-57 and §108 A-59 establish the Third Party Recovery Section within the North Carolina Division of Medical Assistance. The purpose of this agency is to assure the maximum collection of third-party resources.

The Medicaid recipient's attorney is charged with the responsibility of disbursing to Medicaid any amount due it from the recovery. The Medicaid Third-Party Recovery Section

must be notified of all settlement conferences, hearings or other similar events related to recovery efforts. Although Medicaid is not a named party to the action, it is a lienholder with an interest in and a claim on the proceeds of the recovery.

Medicaid is limited to one-third of the gross settlement. Since Medicare will not prorate with Medicaid, if the Medicare recovery is equal to or greater than one-third of the total settlement, Medicaid cannot make any recovery. If the Medicare recovery is less than one-third of the total settlement, then Medicaid can obtain a refund for the difference between one-third of the total settlement and the amount of the Medicare lien.

There is no authority in either federal or state law for a waiver of a Medicaid lien. Medicaid will not reduce its lien by its proportionate share of the procurement costs (including attorney's fees). However, a recipient may request a compromise of a lien in exceptional circumstances.

### **III. SPECIAL NEEDS TRUST**

Because eligibility for Medicaid benefits is based on need, a client's settlement of a personal injury claim may cause him to lose these benefits. This happens when the amount of such settlement results in the client's resources exceeding the maximum amount allowed for Medicaid eligibility. If, as is often the case, Medicaid is the only available option for medical insurance coverage, the client may be forced to use his settlement proceeds to pay for those medical expenses which otherwise would have been covered by Medicaid.

This problem can be avoided with the use of a properly structured trust. The creation of a trust for the settlement proceeds may exempt them from consideration as "income and resources" that are available to the client in determining Medicaid eligibility. See 42 U.S.C. § 1396 p (d) (4). The trust assets can be used to pay for the client's "special needs" - expenses that might not be covered by Medicaid such as medical equipment, transportation, insurance, rehabilitation, computer or electronic equipment, vacations, and other goods and services that add quality to life.

Before funding any special needs trust, any amounts already paid by Medicaid must be repaid.

In order to establish a special needs trust, the following requirements must be met:

- 1) The trust must be funded with assets of the individual;
- 2) The individual must be under 65 years of age at the time the trust is funded;
- 3) The individual must be disabled;

- 4) The trust must be established by a parent, grandparent, legal guardian or a court;
- 5) Any state which paid medical assistance on behalf of the individual must be reimbursed from any amounts remaining in the trust upon the death of the individual.

The definition of disability for these trusts is the same definition contained in the Social Security Act - the client must be unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

Persons over the age of 65 may avail themselves of the use of pooled trusts, which are established by a non-profit association. When the disabling injury occurs to a minor, entitlement benefits may not be available due to the combined assets of their family. However, a special needs trust may still be appropriate as the child can become eligible independent of his family at age 18.

Money from the trust cannot be distributed directly to the person with the disability. Instead, it must be distributed to third parties to pay for goods and services to be used by the person with the disability.

Generally, special needs trusts are funded at the time of the disbursement of the settlement proceeds. Prior to engaging in serious settlement negotiations, the plaintiff's attorney should consult with an attorney with experience in this area to determine the applicability of a special needs trust and to insure that the trust instrument is properly drafted.

#### **IV. ERISA LIENS**

Under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* certain employer-funded medical benefit plans may be entitled to subrogation or reimbursement rights from its participant out of the proceeds of a liability settlement.

A self-funded plan is one where the employer, employees, or a combination of both contribute to the plan assets and bear all the risks in order to create a fund out of which benefits are paid. If an employer establishes a self-funded plan, administration of the plan is controlled by ERISA, which preempts state laws. A self-funded plan may, but is not required to, incorporate subrogation and reimbursement rights to recover the amounts the plan paid out for health benefits when the beneficiary recovers for these expenses from third parties.

Until recently, self-funded plans have generally used ERISA to insist upon full

reimbursement of their liens from the proceeds of third -party recoveries. Many plans refused to reduce their liens by an amount equal to their proportionate share of the injured person's attorney's fees and litigation expenses. A recent decision by the United States Supreme Court has changed the rules.

In *Great-West Life and Annuity Insurance Co. v. Knudson*, 122 S.Ct. 708 (2002), the Court ruled that ERISA does not permit benefit plans to sue their participants at law to enforce contractual subrogation or reimbursement provisions. In that case, the participant was injured in an automobile accident. Her medical bills exceeded \$400,000.00 and were paid by her husband's health insurance plan. The participant recovered \$650,000.00 in a product liability suit against the automobile manufacturer. She offered \$13,838.70 of the settlement to the health benefits plan to satisfy its lien. The remaining net proceeds of the settlement were placed in a special needs trust for the participant's benefit.

The health benefits plan filed suit in federal district court seeking to enforce the reimbursement provision of the plan. The Supreme Court ruled that the plan had no legal right to sue the participant under ERISA. The plain language of the ERISA statute only allows plans to sue members if the plan is seeking an equitable remedy as opposed to a remedy at law. In this case, the plan was seeking to impose personal liability on the participant for a contractual obligation to pay money. This type of relief was not available in equity.

The Supreme Court did not prohibit plans from seeking relief in equity for claimed reimbursement or subrogation rights. ERISA plans might seek equitable relief such as an injunction or the imposition of a constructive trust against identifiable funds. In that event, certain equitable doctrines should be available to plan participants to reduce the amount of the plan's lien.

For example, the common fund doctrine provides that one who benefits from a fund of money obtained by another should pay his proportionate share of the costs incurred to acquire that fund. An ERISA lienholder, therefore, could be required to pay its share of the participant's attorney's fees incurred to obtain the settlement.

Also, the "make whole doctrine" provides that an insurer may not exercise the right of subrogation until its insured is made whole for his total loss. If a participant of a plan has not been compensated for all of his injuries, the plan may not be entitled to any recovery. Both of these doctrines have some support in federal law. It remains to be seen whether these equitable principles can be used successfully to reduce or eliminate an ERISA plan's lien on settlement proceeds.

In any event, the *Knudson* decision creates a considerable doubt as to an ERISA plan's right to recover amounts paid to its participant. This situation should enable participants to negotiate reductions in the amount of claimed liens.

## V. WORKER'S COMPENSATION LIENS

When a personal injury action arises out of the same incident that is the basis for a worker's compensation claim, the worker's compensation carrier is entitled to a lien on the recovery in the third-party liability action for all or part of the benefits paid to the employee-plaintiff. N.C.G.S. § 97-102 (f) (1) (c) provides that reimbursement may be had by the employer "for all benefits by way of compensation or medical compensation expenses paid" for the employee.

Neither the employee nor his attorney may settle with or accept any payment from a third party without the written consent of the employer, and no agreement with the third party shall be valid or enforceable for any purpose unless both the employer and the employee join in such agreement. If all parties do not consent to the third-party settlement in writing, the worker's compensation subrogation interest must be paid in full, minus attorney's fees, or the parties must apply to the superior court for determination of the worker's compensation subrogation interest.

Under N.C.G.S. § 97-10.2, the distribution of proceeds received in a settlement between an injured employee and employer entitled to reimbursement can be decided by either the Industrial Commission or the trial court. The trial court has discretion to reduce or eliminate the subrogation interest. Either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides to determine the subrogation amount. After notice to the employer and the insurance carrier, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective worker's compensation benefits, and the amount of the cost of the third-party litigation to be shared between the employee and the employer.

The judge shall consider the anticipated amount of prospective compensation the employer or worker's compensation is likely to pay to the employee in the future, the net recovery to the plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable in determining the appropriate amount of the employer's lien.

If the Industrial Commission considers this issue, it may only make disbursements according to the schedule set forth in N.C.G.S. § 97-10.2 (f). Any third-party settlement proceeds within the jurisdiction of the Industrial Commission must be disbursed for the following purposes and in the following order of priority:

- 1) To the payment of actual court costs and/or reasonable expenses incurred by the employee in the litigation of the third-party claims;
- 2) To the payment of the fee of the attorney representing the person making settlement, not to exceed one-third of the amount obtained;

3) To the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission;

4) To the payment of any amount remaining to the employee or his personal representative.

Because of the ability of the trial court to reduce the amount of the lien, an injured worker should normally choose the trial court over the Industrial Commission to determine the amount of the worker's compensation subrogation interest.

Because of the prospect of a reduction of the amount of the lien by the trial court, most worker's compensation carriers will engage in negotiations to reduce the amount of the lien so that the settlement with the third-party may take place.

## **VI. MEDICAL PROVIDER LIENS**

If a medical provider who treated the plaintiff for the injuries at issue has not been paid for his services, he may claim a lien on any settlement proceeds. Medical provider liens are created by N.C.G.S. § 44-49 and § 44-50. The lien attaches when there is a recovery of damages, but before any money is paid. The medical provider may enforce the lien against the money which is payable for the personal injury. *Charlotte-Mecklenburg Hospital Authority v. First of Georgia Insurance Co.*, 340 N.C. 88, 90-92, 455 S. E. 2d 655, 657 (1995).

Pursuant to N.C.G.S. § 44-49, any person or corporation to whom the plaintiff may be indebted for any drugs, medical supplies, ambulance services, medical, dental or hospital services rendered in connection with the injury for which damages have been recovered may obtain a lien. In order to obtain a lien, the medical provider must provide the attorney representing the plaintiff an itemized statement of services rendered, medical or hospital records or a medical report for use by the attorney in the negotiation, settlement or trial of the claim and a written notice of the claim of lien. Medical providers may not charge for providing these medical records or bills and also claim a lien. They must be provided without charge. There are no specific methods of notice delineated in the statute.

N.C.G.S. § 44-50 states that an attorney "shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims. Evidence as to the amount of the charges shall be competent in the trial of the action."

N.C.G.S. § 44-50 states that a client's instructions for the disbursement of settlement proceeds are not binding under the disbursing attorney to the extent that the instructions conflict

with the requirements of the statute; however, N.C.G.S. § 44-51, provides that, whenever the sum demanded for medical services shall be in dispute, payment of these charges is not required until the claim is fully established and determined.

N.C.G.S. § 44-50 states that: “the lien provided for shall in no case, exclusive of attorney’s fees, exceed fifty percent of the amount of the damages recovered.” Thus, the amount available is fifty percent of the net settlement proceeds after deduction for attorney’s fees. The statute does not permit deduction of costs prior to determining the amount of the settlement proceeds available to be disbursed to medical providers with liens.

If the amount available to be disbursed to medical providers is not sufficient to pay all of the providers who have perfected liens, there will be a pro-rata distribution. The medical provider can still attempt to collect the balance from the plaintiff.

## MEDICARE LIENS

42 U.S.C § 1395y (b)(2) - Medicare secondary payer

(A) In general

Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that -

(i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or

(ii) payment has been made, or can reasonably be expected to be made promptly (as determined in accordance with regulations) under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.

In this subsection, the term 'primary plan' means a group health plan or large group health plan, to the extent that clause (i) applies, and a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance, to the extent that clause (ii) applies.

(B) Conditional payment

(i) Repayment required.

Any payment under this subchapter with respect to any item or service to which subparagraph (A) applies shall be conditioned on reimbursement to the appropriate Trust Fund established by this subchapter when notice or other information is received that payment for such item or service has been or could be made under such subparagraph. If reimbursement is not made to the appropriate Trust Fund before the expiration of the 60-day period that begins on the date such notice or other information is received, the Secretary may charge interest (beginning with the date on which the notice or other information is received) on the amount of the reimbursement until reimbursement is made (at a rate determined by the Secretary in accordance with regulations of the Secretary of the Treasury applicable to charges for late payments).

(ii) Action by United States

In order to recover payment under this subchapter for such an item or service, the United States may bring an action against any entity which is required or responsible (directly, as a third-party administrator, or otherwise) to make payment with respect to such item or service (or any portion thereof) under a

primary plan (and may, in accordance with paragraph (3)(A) collect double damages against that entity), or against any other entity (including any physician or provider) that has received payment from that entity with respect to the item or service, and may join or intervene in any action related to the events that gave rise to the need for the item or service. The United States may not recover from a third-party administrator under this clause in cases where the third-party administrator would not be able to recover the amount at issue from the employer or group health plan and is not employed by or under contract with the employer or group health plan at the time the action for recovery is initiated by the United States or for whom it provides administrative services due to the insolvency or bankruptcy of the employer or plan.

(iii) Subrogation rights

The United States shall be subrogated (to the extent of payment made under this subchapter for such an item or service) to any right under this subsection of an individual or any other entity to payment with respect to such item or service under a primary plan.

(iv) Waiver of rights

The Secretary may waive (in whole or in part) the provisions of this subparagraph in the case of an individual claim if the Secretary determines that the waiver is in the best interests of the program established under this subchapter.

(v) Claims-filing period

Notwithstanding any other time limits that may exist for filing a claim under an employer group health plan, the United States may seek to recover conditional payments in accordance with this subparagraph where the request for payment is submitted to the entity required or responsible under this subsection to pay with respect to the item or service (or any portion thereof) under a primary plan within the 3-year period beginning on the date on which the item or service was furnished.

## MEDICAID SUBROGATION RIGHTS

### **§ 108A-57. Subrogation rights; withholding of information a misdemeanor.**

(a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance, or of the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person. The county attorney, or an attorney retained by the county or the State or both, or an attorney retained by the beneficiary of the assistance if this attorney has actual notice of payments made under this Part shall enforce this section. Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered. The United States and the State of North Carolina shall be entitled to shares in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

(b) It is a Class 1 misdemeanor for any person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the county department of social services or its attorney the identity of any person or organization against whom the recipient of assistance has a right of recovery, contractual or otherwise.

ERISA RIGHT TO REIMBURSEMENT

29 U.S.C § 1132. - Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

## WORKER'S COMPENSATION LIENS

### **§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.**

(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

(b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. During said 12-month period, and at any time thereafter if summons is issued against the third party during said 12-month period, the employee or his personal representative shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below.

(c) If settlement is not made and summons is not issued within said 12-month period, and if employer shall have filed with the Industrial Commission a written admission of liability for the benefits provided by this Chapter, then either the employee or the employer shall have the right to proceed to enforce the liability of the third party by appropriate proceedings; either shall have the right to settle with the third party and to give a valid and complete release of all claims to the third party by reason of such injury or death, subject to the provisions of (h) below. Provided that 60 days before the expiration of the period fixed by the applicable statute of limitations if neither the employee nor the employer shall have settled with or instituted proceedings against the third party, all such rights shall revert to the employee or his personal representative.

(d) The person in whom the right to bring such

proceeding or make settlement is vested shall, during the continuation thereof, also have the exclusive right to make settlement with the third party and the release of the person having the right shall fully acquit and discharge the third party except as provided by (h) below. A proceeding so instituted by the person having the right shall be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto. If the employee or his personal representative shall refuse to cooperate with the employer by being the party plaintiff, then the action shall be brought in the name of the employer and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the

interest of justice exclude the employer from the trial of the claim against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment and/or reasonable expenses incurred by the employee in the litigation of

the third-party claim.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of G.S. 97-90 but shall not exceed one third of the amount obtained or recovered of the third party.

c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

(2) The attorney fee paid under (f)(1) shall be paid by the employee and the employer in direct proportion to the amount each shall receive under (f)(1)c and (f)(1)d hereof and shall be deducted from such payments when distribution is made.

(g) The insurance carrier affording coverage to the

employer Under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:

(1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or

(2) If either party follows the provisions of subsection (j) of this section.

(i) Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.

(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose, where the injured

employee resides or the presiding judge before whom the cause of action is pending, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

## MEDICAL PROVIDER LIENS

### § 44-49. Lien created; applicable to persons non sui juris.

(a) From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State. This lien is in favor of any person, corporation, State entity, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services rendered in connection with the injury in compensation for which the damages have been recovered. Where damages are recovered for and in behalf of minors or persons noncompos mentis, the liens shall attach to the sum recovered as fully as if the person were sui juris.

(b) Notwithstanding subsection (a) of this section, no lien provided for under subsection (a) of this section is valid with respect to any claims whatsoever unless the physician, dentist, nurse, hospital, corporation, or other person entitled to the lien furnishes, without charge to the attorney as a condition precedent to the creation of the lien, upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical report for the use of the attorney in the negotiation, settlement, or trial of the claim arising by reason of the personal injury, and a written notice to the attorney of the lien claimed.

(c) No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created under subsection (a) of this section when recovery has been had by the person injured, and no claims against the recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in the action for personal injuries.

**§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.**

A lien as provided under G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. If an attorney represents the injured person, the lien is perfected as provided under G.S. 44-49. Before their disbursement, any person that receives those funds shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims. Evidence as to the amount of the charges shall be competent in the trial of the action. Nothing in this section or in G.S. 44-49 shall be construed so as to interfere with any amount due for attorney's services. The lien provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered. Except as provided in G.S. 44-51, a client's instructions for the disbursement of settlement or judgment proceeds are not binding on the disbursing attorney to the extent that the instructions conflict with the requirements of this Article.

**§ 44-51. Disputed claims to be settled before payments.**

Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this Article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when any such sums are in dispute the amount of the lien shall in no case exceed the amount of the bills in dispute.

