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NEW TEXAS COVERAGE CASE ALERT – March 18, 2011

Texas' Hospital Lien Law and "*Stowers*" Pressure to Settle Can Lead to Insurer's Settlement Nightmare

Tex. Prop. Code Section 55.002 provides that a hospital "has a lien on a cause of action or claim of an individual who receives hospital services for injuries caused by an accident that it attributed to the negligence of another person." The lien applies when the injured plaintiff is admitted to a hospital within 72 hours of the accident. It also extends to a subsequent facility if the plaintiff is transferred from the first hospital. To secure its lien, however, the hospital must file notice of its lien with the county clerk before the liability settlement money is paid. The county clerk then records the lien in its records under the name of the injured person. If the injured party has no medical insurance and otherwise has not paid the hospital bill, the lien may be the hospital's only recourse for payment. So, before any personal injury settlement, the insurer (and defense counsel) must search the applicable county's lien records for any lien filed under the plaintiff's name, and account for it as part of any settlement (typically by including the hospital as a joint payee on the settlement check). But what if a search turns up no lien filed?

In *Memorial Hermann Hospital System v. Progressive County Mutual Ins. Co.,* No. 01-10-99408-CV (Tex. App.—Houston [1st Dist.], March 17, 2011) the plaintiff's hospital bill totaled $130,365.92. Twenty-two days after the accident, and after searching for and not finding any hospital lien on file, the at-fault party's liability insurer settled the claim for policy limits. In an abundance of caution, however, the insurer issued its settlement check for $100,000 with the claimant, claimant's attorney and the hospital all shown as payees. The claimant's counsel rejected that check, insisting that it was improper to name the hospital as payee without any lien on file. So, on December 12, and probably under threat of "*Stowers*" exposure if it did not, the insurer agreed to issue a new check without the hospital as payee. Before actually sending out the new check, however, the insurer once again checked the county clerk's website twice, at 2:25 p.m. and again at 3:30 p.m., and still found nothing. When sued by the hospital, however, the insurer must have been shocked to learn that the hospital had filed its lien at 2:50 p.m., *i.e.*, 30 minutes before it sent out its check, and that the county clerk did not get it indexed and recorded so that it appeared on the county's website until December 17.

In the hospital's new suit, the trial court agreed with the insurer that since it had paid out the settlement before the county clerk got the hospital's lien filing indexed, the hospital had not perfected its lien in time. The court of appeals reversed and held that the statute only required the hospital to file its lien before settlement monies are paid irrespective of how long it may take for the lien to show up in the publically available records.

PRACTICE POINTERS: It is hard to be critical of the insurer's actions in this case; it appears to have exercised extreme due diligence. It even seems to have known that a lien was going to be filed at any moment. But this case shows that insurers must be careful about liens, especially when settling cases so early on that the hospital's lien filing may be crossing in the mail with the insurer's settlement check.

With no lien showing up as having been filed, the insurer was probably feeling pressure under "*Stowers*" if it refused to accept the policy limits demand without naming the hospital as a payee. One option would have been to actually call the hospital shortly (*i.e.*, minutes) before the settlement check was handed over to find out if they had filed a lien yet. But that option is only as good and safe as the accuracy of the "no" answer given. Another potential option might be to get an agreement from the claimant's counsel that the settlement funds will be held in trust for X days and returned if it is discovered within those same X days that a lien had been filed before the check was issued. But that takes some cooperation by the plaintiff's attorney. Failing either of those options, and absent a sufficiently rich and solvent plaintiff or plaintiff's attorney upon which to rely for a real contractual indemnity right for protection against a discovered lien in the settlement agreement, the insurer's only other, and still not ideal, option may have simply been to refuse to accede to the demand that the check be cut without the hospital as a payee. After all, the touchstone of a proper "*Stowers*" policy limits demand is that the terms be reasonable. If the plaintiff's lawyer will not agree to such a simple safeguard as allowing a few days to pass before the funds are disbursed so that any last minute lien filing can be discovered, it arguably is unreasonable for an insurer to be expected to pay its limits less than 45 days after the accident without the hospital as a payee.

If you wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at www.schubertevans.com.