

# HEALTHCARE LEGISLATIVE / PRACTICAL UPDATE

1. Hospital Liens
2. Hospital Health Plan Subrogation
3. Hospital District / Indigent Health Plan Subrogation

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# Third-Party Recovery Effort

- **Goals Today:**

- *How to reduce your exposure from your collection effort*
- *How to increase your recoveries to the level you deserve*

# Third-Party Recovery Effort – Providers

## ■ Providers

- *The focus is on patients who have been injured by a third-party. MVA is the best example.*

## ■ Provider/Hospital

1. *Uninsured patients injured by a third-party/looking to third-party to pay the bill*
  2. *Seeking payment on copays/deductibles from insured patients injured by a third-party*
1. Third-party liability insurance carriers can become a payor source as can the
  2. UM / UIM / Med Pay / PIP Policy of the patient themselves or
  3. The vehicle the patient was riding in

# Third-Party Recovery Effort – Payors

- Payors seek reimbursement because it has paid for/provided medical care under some form of:
  - *Health Plan Package*
  - *Indigent Care Plan*
  - *Hospital District Program*

**And is seeking to be reimbursed for that payment or the cost of care from the**

- *Liabe third-party or*
  - *Available Underinsured / Uninsured Motorist Protection / PIP / Med Pay*
- In either case, the process is the identification, investigation and prosecution of personal injury claims held by the patient / plan beneficiary

# Providers Seeking Payment/Reimbursement – Tools to Use

- Providers - Hospitals Providing Care to Patients Without:
  - A payor source
  - *Whose treatment was necessitated by the conduct of a third-party (a tort claim)*
  - *Have the right under Ch. 55 of the Property Code to file a hospital lien*
- It is the only remedy under the hospital lien statute
  - McAllen Hospitals, L.P. v. State Farm County Mutual Insurance Co., (Tex. 2014) No. 12-0983
- Assignment

# Payors Seeking Payment/Reimbursement – Tools to Use

- Payors – to the extent that a hospital is the payor/provider of . . .
  - *a self-insured benefit plan,*
  - *an indigent county plan (Ch. 61 Health and Safety Code),*
  - *Medicaid, CHIPS, etc.*

. . . they have the rights to be reimbursed for the amount paid/cost of the care provided.

- These rights are contractual and/or statutory and consist of the right of subrogation, assignment and reimbursement.

# Hostile Reality of Third-Party Collection Efforts in 2018

- I need to disabuse you of any notion that a **hospital's patient or a health plan's beneficiary** will willingly pay the hospital or repay the health plan when their tort case is settled.

# Hostile Subrogation Climate

## ■ Tort Reform:

- *The strength and weakness of the subrogation claim is wholly reliant on the strength or weakness of the underlying tort claim.*
- *Tort reform through HB 4 in 2003*
- *Texas Supreme Court's opinion in Escabedo in late 2011 has reduced jury verdicts, and therefore settlements by 75%*
- *Highly adversarial relationship between patient's attorney and the provider/payor.*
- ***There will never be enough money to go around creating adversarial relationships between plaintiffs/plaintiff's attorneys and provider/payors.***

# McAllen Hospital v. State Farm

# Plaintiff's Attorneys Response to Sharply Reduced Verdicts

- On a National Level

# Plaintiff's Attorneys Response to Sharply Reduced Verdicts - Cont.

- On a State Level

- *Texas Trial Lawyers Association in Texas developed tactics solely devoted to the elimination or reduction of hospital liens and subrogation claims and disseminated the information through*
  - *List-serves*
  - *Seminars*

# Plaintiff's Attorneys Response to Sharply Reduced Verdicts - Cont.

- On a State Level
  - *Plaintiff's attorneys are encouraged to*
    - Hide from you the fact that they are making a claim/settling around you
      - Erosion of Hospital Lien – *McAllen Hospital Case*
    - Aggressively misrepresent
      - *The factual basis of the underlying tort claim*
        - Preexisting injury
        - Weak case
        - *The amount of available liability and UM/UIM coverage*
        - *EX: 30,000 Limit*

# Plaintiff's Attorneys Response to Sharply Reduced Verdicts - Cont.

- On a State Level
  - *Plaintiff's attorneys are encouraged to*
    - **Manipulate the settlement** in such a way that a hospital or payor cannot recover under its lien or subrogation claim by manipulating the theoretical basis of the claim.
      - A. *Wrongful death vs survivor*
      - B. *Negligence vs Non Negligence*
        - Sec. 55.002. LIEN. (a) 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 is attributed to the **negligence** of another person. For the lien to attach, the individual must be admitted to a hospital not later than 72 hours after the accident.
    - **Manipulate how a settlement is allocated among plaintiffs.**

# Plaintiff's Attorneys Response to Sharply Reduced Verdicts - Cont.

- On a **State Level**
  - *Plaintiff's attorneys are encouraged to*
    - **Utilize Accord and Satisfaction**
    - **Probate Court**
    - **Billing Requests**
- These are all techniques focused on the elimination or sharp reduction of a lien or subrogation claim. There are many more.

# Offensive Claims by Plaintiff

- **Plaintiffs lawyers over the last 2 ½ years are now offensively threatening and filing suits maintaining that you need to pay them, instead of the other way around**

# Offensive Claims by Plaintiff – Cont.

- **LEGAL BASIS** - Plaintiffs maintain that the following conduct, separately or in combination, constitute a violation of:
  - *Chapter 12 CPRC, the false lien statute,*
  - *The Texas Debt Collection Act (Finance Code 392),*
  - *Texas Deceptive Trade and Consumer Protection Act, which incorporates violations of the Finance Code (Texas Business and Commerce Code, Section 17.41 et seq.)*
- **The latter of two allow for penalties, additional damages, and attorney's fees.**
- **The false lien statute, Section 12.002, allows for \$10,000 per violation plus attorneys fees and exemplary damage.**

# Offensive Claims by Plaintiff – Cont.

- FACTUAL BASIS
  - *Reasonableness*

# Offensive Claims by Plaintiff – Cont.

- FACTUAL BASIS

- *Claims based on the argument that you are asking for more in your lien recovery effort than you are entitled to by statute or your own documentation*

# Offensive Claims by Plaintiff – Cont.

## ■ FACTUAL BASIS

### – **Ch. 146 CPRC – Not billing payors**

- The failure to timely bill a payor (other than Medicare/*Speegle*) constitute a waiver of the ability to bill a patient for anything beyond that which a patient would have paid had the payor been timely billed,
- Section 146 CPRC mandates providers bill a payor if available. While the statute does not expressly reference hospitals, Texas Government Code Section 311.005 provides for the definition of person is not defined under another statute and would include the hospital
- *Speegel* opinion states that federal Medicare laws trump section 146 and a hospital may either 1) bill Medicare for payment and withdrawal claims/liens against liability insurance beneficiary or liability insurance settlement or 2) maintain all claims liens against the liability insurance/beneficiary liability insurance settlement

# Medicare Eligible Patients

# Offensive Claims by Plaintiff – Cont.

- **FACTUAL BASIS**

- *Ch. 146 CPRC – Not billing payors*
  - You can lien copays and deductibles
  - Must bill payors

# Offensive Claims by Plaintiff – Cont.

- FACTUAL BASIS

- ***Admission vs. ER treatment issue - long term solutions to collecting on ER only treatment***
  - It was the subject of the 2017 legislative session and the only theory that cannot be completely resolved through modification of your existing admission/discharge paperwork.
  - Focuses on section 55.002(a) of the Property Code

# Offensive Claims by Plaintiff – Cont.

- **Property Code Section 55.002(a)**

- (a) 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 is attributed to the **negligence** of another person. For the lien to attach, the individual must be **admitted** to a hospital not later than 72 hours after the accident.

- This plaintiffs' argument maintains that the second sentence is most important - that the hospital may only have a lien on a patient that has been “admitted” to the hospital.

# Assignments

- You already use assignment language when it comes to assigning first party rights, those the patient has against their own health insurer, on a daily basis. The same can be used to grant you rights against third parties or other first party insurance, such as UIM coverage.

# Assignments – Cont.

- Assignment language would also
  - *Allow us to prosecute a claim that the plaintiff decides to not move forward with.*

# Recommendations for Providers

# Health Care Subrogation under Chapter 140 Civil Practices & Remedies Code

- Passed during the 2013 Legislative Session
- Became effective January 1, 2014
- Anti-Subrogation
- Altered healthcare subrogation
- Purpose was to eliminate healthcare and disability subrogation rights in Texas
- I was involved in negotiations over the bill on behalf of the Texas Association of Health Plans and our health plan clients
- Jay Thompson and I ultimately wrote the substantive provisions that were negotiable of what became Chapter 140 C.P.R.C.

# What plans are affected by Ch. 140?

- Applies to almost all disability or health benefit plans covering medical or surgical expenses with limited exceptions
- Plans excluded from Ch. 140
  - *Workers' Compensation*
  - *Medicare/Medicaid/CHIPS*
  - *Self-funded ERISA plans*
    - Not all self-funded plans are ERISA
    - Example: Church Plans

# Hospital District / County Indigent Plans

- Hospital Districts / County Assistance Programs are created under Ch. 61 of the Health and Safety Code, and therefore are subject to Ch. 140.

# Payors' Recovery Limited by Ch. 140.005

- This is where the bulk of the negotiations occur.
- Under *Fortis* (Texas case law) the subrogated party could take whole settlement.
- The bill as introduced attempted to limit the subrogated party to 5% of the settlement.
- **Subsection 140.005(a)**
  - *(a) If an injured covered individual is entitled by law to seek a recovery from the third-party tortfeasor for benefits paid or provided by a subrogee as described by Section 140.004, then all payors are entitled to recover as provided by Subsection (b) or (c).*
    - States that the statute applies to individuals who are entitled by law to seek recovery from a third-party tortfeasor for benefits paid or provided.
    - This means that children and wrongful death claimants could be excluded from a subrogation claim by plaintiff's attorneys **manipulating settlements.**

# Payors' Recovery Limited by Ch. 140.005 – Cont.

## ■ Subsection 140.005(b) and (c)

- *(b) This subsection applies when a covered individual is not represented by an attorney in obtaining a recovery. All payors' share under Subsection (a) of a covered individual's recovery is an amount that is equal to the lesser of:*
  - (1) one-half of the covered individual's gross recovery (50% of the settlement); or
  - (2) the total cost of benefits paid, provided, or assumed by the payor as a direct result of the tortious conduct of the third-party.
- *(c) This subsection applies when a covered individual is represented by an attorney in obtaining a recovery. All payors' share under Subsection (a) of a covered individual's recovery is an amount that is equal to the lesser of:*
  - (1) one-half of the covered individual's gross recovery less attorneys fees and procurement costs as provided by Section 140.007 (50% of the settlement minus attorneys fees and pro rata costs); or
  - (2) the total cost of benefits paid, provided, or assumed by the payor as a direct result of the tortious conduct of the third party less attorneys fees and procurement costs as provided by Section 140.007.

# Payors' Recovery Limited by Ch. 140.005 – Cont.

- These sections limit the payor to at most 50% of the settlement.
  - *Senator Duncan insisted that the injured plan member receive some portion of the recovery.*

# Subsection 140.005

- (d) A common law doctrine that requires an injured party to be made whole before a subrogee makes a recovery does not apply to the recovery of a payor under this section.
  - *Made whole doctrine does not apply*

# Attorneys Fees for a Ch. 140 Declaratory Judgment Action / Ch. 140.006

- To the extent that either side is to challenge a provision they will not be able to request attorney fees from the opposition if they win.

# Attorneys Fees in Recovery Action

## Ch. 140.007

- From the payor's share (limited to 50% of the settlement by Ch. 140.005)
  - *The plan member's attorney may recover up to 1/3 of that amount in attorneys fees plus pro rata case expenses if the plan doesn't have its own attorney prosecuting a subrogation claim.*
- Key words there are "up to 1/3"
  - *Don't just give 1/3, make the attorney prove that he earned his or her fee*

# Fighting the Assessment of Attorneys Fees

# Again, Plaintiff's Attorneys Are Encouraged by TTLA to:

- Hide from you the fact that they are making a claim/settle around you
- Aggressively misrepresent
  - *the factual basis of the underlying tort claim*
  - *preexisting injury*
  - *strength of their case*
  - *the amount of insurance coverage*
- Manipulate the settlement
  - *wrongful death versus survivor*
- Manipulate how a settlement is allocated
- Utilize Accord and Satisfaction
- Eliminate death claims in Probate Court

# Conclusion for Payors/Health Plans

- In order to get the returns that you deserve, you must:
  - *Know as much about the case as the plaintiff's attorney*
  - *Retain your own attorneys to identify and prosecute these claims turnkey, and in compliance with Ch. 140 – not ad hoc.*
  - *Aggressively fight the attorneys fees claims under Ch. 140.007*

# TTLA and the 2017/2019 Legislative Session

- Cost sharing provisions similar to Ch. 140 on Hospital Liens
- Be prepared to participate in 2019 session.