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Commentary

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[Editor's Note: Ryan K. Hilton and R. Steven Rawls are partners with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Philadelphia, Tallahassee, Mobile, and Miami. Comments in this article are those of the authors and not their law firm or Mealey's. *Responses to this commentary are welcome.]*

Over forty states have hospital lien laws.[1] Those laws typically allow hospitals to recover against parties, including insurers, who impair their liens. In many states, the hospital lien laws do not clearly identify the type and extent of damages a hospital can recover against a party who impairs a hospital lien. The damages a hospital can recover from a party who impairs a lien depends upon the language of the applicable hospital lien law and the courts' interpretations of that law. Results vary from state to state.

An insurance carrier that fails to account for a hospital lien may face exposure above its policy limits, regardless of whether the carrier previously exhausted its limits in a settlement that excluded the hospital. This is true even where the carrier did not have actual notice of the hospital lien. Under some hospital lien laws, a carrier's constructive notice of a hospital lien suffices.

I. Alabama

In *University of South Alabama v. Progressive Insurance Company*,[2] the Supreme Court of Alabama held that the insurer's impairment of a hospital lien entitled the hospital to its costs of care and treatment even though the costs exceeded the amount of the prior settlement that did not include the hospital. In this case, Progressive's insured struck a bicyclist who was then transported to the University of South Alabama Medical Center for treatment. The hospital's charges for the bicyclist's care and treatment amounted to $57,097. The hospital perfected its lien in accordance with section 35-11-370 of the Alabama Code.

Section 35-11-370 of the Alabama Code, which allows for hospital liens, provides:

> Any person, firm, hospital authority or corporation operating a hospital in this state shall have a lien for all reasonable charges for hospital care, treatment and maintenance of an injury person who entered such hospital within one week after receiving such injuries, upon any and all actions, claims, counterclaims and demands accruing to the person to whom such care, treatment or maintenance was furnished, or accruing to the legal representatives of such person, and upon all judgments, settlements and settlement agreements entered into by virtue thereof on account of injuries giving rise to such actions, claims, counterclaims, demands, judgments, settlements or settlement agreements and which necessitated such hospital care, subject, however, to any attorney's lien.[3]

Progressive, the tortfeasor's insurer, received actual notice of the hospital lien. The next day, Progressive

wrote to the hospital stating, in pertinent part, that "[i]f liability is decided that we will owe for the injuries sustained to [the claimant] as a result of the accident we will protect the hospital's interest when payment is made." Progressive disputed its insured's liability for the accident. Progressive took the position that it had no liability for the hospital lien.

Progressive eventually paid $6,000 to the bicyclist in exchange for his agreement that he would not sue Progressive's insured. Progressive did not include the hospital in the settlement, though. After learning of the settlement, the hospital sued Progressive for impairing its lien. The hospital demanded judgment against Progressive "for the reasonable cost of [the claimant's] hospital care, treatment and maintenance, plus costs and reasonable attorney's fees."

The court addressed section 35-11-372 of the Alabama Code. This section of the code concerns civil actions for damages based on an impairment of a statutory hospital lien. The code provides, in part:

> [A]fter the lien provided for by this division [§ 35-11-370 et seq.] has been perfected, as provided in [§ 35-11-371], by any lienholder entitled thereto, no release or satisfaction of any action, claim, counterclaim, demand, judgment, settlement or settlement agreement, or any of them, shall be valid or effectual as against such lien unless such lienholder shall join therein or execute a release of such lien.
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> Any acceptance of a release or satisfaction of any such action, claim, counterclaim, demand or judgment and any settlement of any of the foregoing in absence of a release or satisfaction of the lien referred to in [§ 35-11-370] shall prima facie constitute an impairment of such lien, and the lien-holder shall be entitled to a civil action for damages on account of such impairment, and in such action may recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment and maintenance. . . .If the lienholder shall prevail in such action, the lienholder shall be entitled to recover from the defendant, costs and reasonable attorneys fees. . . .

The trial court found that Progressive impaired the lien but limited the damages the treating hospital could recover to the amount of the settlement between Progressive and the bicyclist.[4] On appeal, the hospital argued that it was entitled to the full amount of its lien for the reasonable costs of care it rendered.[5] The Supreme Court of Alabama considered whether the hospital's recovery was limited to the amount paid to the injured party by the insured or whether the hospital was entitled to recover the reasonable costs of its care, treatment and maintenance of the injured patient.[6]

In reviewing Section 35-11-372, the court observed that the Legislature plainly and unambiguously stated that a lienholder, such as the hospital, " 'may recover from the one accepting [the] release. . .the reasonable cost of [the] hospital care, treatment and maintenance [of the injured person].' "[7] The court found that the statute "clearly does *not* limit the damages to the amount of the consideration paid for the release."[8] Thus, the court agreed with the hospital that the trial court erred in interpreting the hospital lien statute as limiting the hospital's damages to the amount of the settlement between the tortfeasor's insurer and the claimant.[9]

Chief Justice Nabers concurred in part and dissented in part. He concurred with the judgment finding that Progressive impaired the hospital lien.[10] The chief justice, however, dissented from the main opinion with respect to the amount the hospital could recover.

In the dissenting part of his opinion, Chief Justice Nabers pointed out that the statute says that a hospital " '*may* recover . . . the reasonable costs of [the] hospital care, treatment and maintenance' " that the hospital provided to the injured party.[11] The chief justice noted that the Alabama Legislature did not state that a hospital " 'shall be entitled to recover' " such damages.[12] Yet the Legislature said in the same statute that if the lienholder prevailed in a civil action, " 'the lienholder *shall be entitled* to recover from the defendant, costs and reasonable attorney's fees.' "[13] Accordingly, Chief Justice Nabors reasoned that the Legislature intended a difference when it used "may recover" with respect to the recovery by the lienholder hospital of costs for

services and "shall be entitled to recover" with respect to litigation costs and attorney fees.[14]

Chief Justice Nabers opined that requiring an insurer to pay more than what it contracted for (that is, more than the policy limits) is inequitable and should not be mandated by a statute that uses the permissive "may" rather than the mandatory "shall."[15] Notably, neither the main opinion nor Chief Justice Nabers' concurring and dissenting opinion disclosed what Progressive's policy limits were.

The Supreme Court of Alabama affirmed the trial court's judgment insofar as it held that Progressive had impaired the hospital lien.[16] However, the court reversed the trial court's judgment that limited the hospital's recovery to $6,000, the amount of the prior settlement, and remanded the case for entry of a judgment consistent with its opinion.[17] The opinion did not address the hospital's attorney's fees and costs.

Based upon the foregoing, under Alabama law, if an insurer pays the claimant without taking into account a valid hospital lien where the policy limits are low and the hospital lien is high, the insurer could nonetheless find itself liable for the full amount of the hospital lien.

II. Florida

The Supreme Court of Florida recently addressed the amount of damages a hospital can recover against an insurer for impairing a hospital's lien by settling with the injured claimant without including the lienholder hospital in the settlement.[18]

In *Shands Teaching Hospital*, Mercury Insurance Company issued an automobile insurance policy to Nancy Conley. The policy provided bodily injury liability coverage in the amount of $10,000 per person/$20,000 per accident and personal injury protection ("PIP") coverage in the amount of $10,000.

On December 11, 2005, Milford Bryant, a permissive driver of Conley's insured vehicle, had an accident with a pedestrian, Kristal Price. Price was admitted to Shands Teaching Hospital ("Shands"), where she received medical treatment for three days from December 11, 2005 through December 14, 2005. Shands charged Price $38,418.20 for the medical services it rendered to her.

On December 21, 2005, Shands recorded and perfected a lien in the amount of $38,418.20 in the public records of Alachua County. On April 14, 2006, in exchange for Price's release of Mercury and its insureds from all bodily injury liability, Mercury tendered its $10,000 bodily injury liability limits to Price. On May 4, 2006, Shands served Mercury with a copy of its lien for the first time. Roughly three weeks later, on May 26, 2006, Mercury paid Shands the policy's $10,000 PIP limits.

On August 29, 2006, Shands sued Mercury for impairing its lien. Shands initially sought to recover the full amount of its $38,418.20 hospital lien from Mercury. Shands later acknowledged Mercury's payment of $10,000 in PIP benefits to Shands on May 26, 2007, thereby reducing the amount of Shands' lien to $28,418.20. On May 29, 2007, Mercury served Shands with a proposal for settlement for $17,700. The trial court denied cross-motions for summary judgment, rejecting Mercury's arguments that the Alachua County Hospital Lien Law violated the Florida Constitution.

Ultimately, the trial court determined that Mercury had impaired Shands' lien and that, but for the impairment, the claimant's underlying cause of action would have resulted in a judgment far greater than the cost of Price's treatment.[19] However, the trial court also found that all damages in excess of $10,000 were "nominal damage[s]" because the "judgment would have been uncollectable and of no commercial value."[20] Therefore, the trial court limited Shands' damages to $10,000, the amount of liability coverage that Mercury had paid to Price, as well as attorney fees and costs.[21]

Mercury appealed the judgment, asserting that the Alachua County Hospital Lien Law ("Lien Law") and the Alachua County Hospital Lien Ordinance ("Lien Ordinance") violated the Florida Constitution as well as Mercury's substantive due process rights under the Florida and United States Constitutions. The First District Court of Appeal reversed the trial court's judgment, holding that the Lien Law and Ordinance were unconstitutional under the Florida Constitution.[22]

Shands appealed the First District's decision to the Supreme Court of Florida, arguing that the Alachua County Hospital Lien Law and Ordinance were constitutional under article III, section 11(a)(9) of the

Florida Constitution. Shands also argued that it should receive damages for the full reasonable amount of Ms. Price's treatment and attorney fees as the prevailing party in the case.

Although the Supreme Court of Florida in *Shands Teaching Hospital* court found that the Alachua County Hospital Lien Law was unconstitutional, it found that the Alachua County Hospital Lien Ordinance was constitutional.[23] Accordingly, the court found that Shands' lien was valid and enforceable against Mercury under the Alachua County Hospital lien Ordinance. The relevant portion of the Lien Law and the corresponding portion of the Lien Ordinance provide:

> Any nonprofit corporation operating a hospital that has qualified pursuant to s. 501(c)(3) of the Internal Revenue Code as a charitable hospital, located in Alachua County, shall be entitled to a lien for all reasonable charges for hospital care, treatment, and maintenance of ill or injured persons upon any and all causes of action, suits, claims, counterclaims, and demands accruing to such persons or the legal representatives of such persons, and upon all judgments, settlements, and settlement agreements rendered or entered into by virtue thereof, on account of illness or injuries giving rise to such causes of action, suits, claims, counterclaims, demands, judgment, settlements, or settlement agreements and which necessitate or shall have necessitated such hospital care, treatment and maintenance.
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> . . . No release or satisfaction of any action, suit, claim, counterclaim, demand, judgment, settlement, or settlement agreement, or of any of them, shall be valid or effectual as against such lien unless such lienholder shall join therein or execute a release of such lien. Any acceptance of a release or satisfaction of any such cause of action, suit, claim, counterclaim, demand, or judgment and any settlement of any of the foregoing in the absence of a release of satisfaction of the lien referred to in this act shall prima facie constitute an impairment of such lien and the lienholder shall be entitled to an action at law for damages on account of such impairment, and in such action may recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment, and maintenance. Satisfaction of any judgment rendered in favor of the lienholder in any such action shall operate as a satisfaction of the lien. Any action by the lienholder shall be brought in the court having jurisdiction of the amount of the lienholder's claim and may be brought and maintained in the county wherein the lienholder has his, its, or their residence or place of business. If the lienholder shall prevail in such action, the lienholder shall be entitled to recover from the defendant, in addition to costs otherwise allowed by law, all reasonable attorney's fees and expenses incident to the matter.[24]

The court then addressed damages the hospital could recover in its impairment action. The *Shands Teaching Hospital* court found that, because the insured was uncollectable, the value of the impairment of the lien was Mercury's policy limits, which was $10,000 for bodily injury liability, even though the hospital's outstanding balance was $28,418.20.[25] The Supreme Court of Florida did not define "uncollectable" in its opinion.

Mercury's answer brief provides some information the court may have considered in discussing whether the insureds were "collectable." According to Mercury, the trial court found that Mercury's named insured, Conley, and her insured permissive driver, Bryant, were "essentially judgment proof, and one of them is even knowledgeable about the bankruptcy process."[26] The trial judge stated that he did not see any showing of any particular value to any future expectation of recovery from a judgment that would have been obtained against Mercury's insureds in excess of the lien amount.[27] That being the case, the trial judge found that Shands should recover $10,000 against Mercury, which was the amount of available liability insurance proceeds that was there and that there had been a clear impairment with respect to that.[28]

Other Florida courts have considered the "collectability" of tortfeasors in instances where an insured settles with a third-party tortfeasor in violation of a policy's nonsettlement provision. The insurer is presumed to have been prejudiced by a settlement in a UM case, for example.[29] However, under Florida law, prejudice to an insurer is a rebuttable presumption.[30] The burden rests upon the insured to show that the breach did not actually prejudice the insurer.[31] An insured can carry that burden by showing that the settling tortfeasor was uncollectable or judgment proof.[32] In *Armstrong v. Allstate Indemnity Company*, the deposition testimony of the tortfeasor, which set forth his age, income, education and general inability to pay an adverse judgment, presented a genuine issue of material fact as to whether the insurer was prejudiced by the release of the tortfeasor (whether he was and would remain judgment proof).[33]

In *Argiro v. Progressive American Insurance Company*,[34] based upon the evidence presented by the insured, the court found that there was no reason to believe the insured's contention that the tortfeasor was, and would remain, "judgment-proof" or uncollectable. The appellate court explained that the record showed that the tortfeasor was a college student with good grades, holding a part-time job.[35] Furthermore, he had both a checking and savings account in addition to savings bonds.[36] Accordingly, the insured failed to present evidence sufficient to overcome the presumption of prejudice caused by the insured's settlement with the third-party tortfeasor in violation of the nonsettlement provision in the insurance policy.[37]

In another UM case, the court found that the negligent motorist, who was an impoverished maid, was completely judgment proof.[38] The UM insurer nonetheless argued that based on the twenty year viability of a Florida judgment and the remote possibility that any debtor may eventually secure funds with which to pay at least part of the judgment, depriving a carrier of any judgment, however uncollectable, against any defendant, however insolvent, was necessarily prejudicial. The court rejected that argument by stating: "This contention is so utterly contrary to common business sense and commercial reality as to be unworthy of any comment beyond summary rejection."[39]

In addition to awarding Mercury's $10,000 bodily injury limits to Shands, the Supreme Court of Florida found that, although the trial court improperly awarded attorney fees to Shands based on the Alachua County Hospital Lien Law, the award was upheld under the Alachua County Hospital Lien Ordinance, which states that if the lienholder prevails in an impairment action, "the lienholder shall be entitled to recover from the defendant, in addition to costs otherwise allowed by law, all reasonable attorney's fees and expenses incident to the matter."[40]

Mercury was not entitled to attorney fees following its proposal for settlement in the amount of $17,700 because Shands' "judgment obtained" could not have exceeded $13,275 in order for Mercury to be awarded attorney fees.[41] The Supreme Court of Florida found that the trial court properly calculated Shands' pre-offer interest and attorney fees, which when added to the $10,000 in damages, equaled $18,050.09.[42] Even without accounting for Shands' pre-offer costs, " '[t]his amount not only exceed[ed] the 'target' amount of $13,275.00, but exceed[ed] the total amount of the offer.' "[43]

Against this backdrop, factors in determining whether someone is collectable include that person's age, educational background, academic achievements, occupation and assets, including checking and savings account balances. According to *Shands Teaching Hospital*, if the insured is uncollectable, the value of the impairment of the lien could be the policy limits because that is the only amount that the hospital would ever be able to collect from the insured tortfeasor. If the insured is collectable, the value of the impairment of the lien is determined by the amount of the insured tortfeasor's collectability, which may be difficult to readily ascertain.

A third-party liability insurer will ultimately be responsible for damages in a hospital's impairment action if the insurer, on behalf of the insured and in its own discretion, settled with the third-party claimant without taking into account the hospital lien, even though the insurer exhausted its policy limits in a prior settlement that did not include the hospital.

III. Nebraska

In *Bryan Memorial Hospital v. Allied Property and Casualty Insurance Company*,[44] a federal district court,

applying Nebraska law, found that an insurer impaired a hospital lien, subjecting the insurer to pay damages above the policy limits.

Bryan Memorial Hospital involved Allied's insured who was involved in an auto accident with Murial Rokes. Rokes was admitted to Lincoln General Hospital for medical treatment of the injuries she sustained in the accident. The hospital treated Rokes for twelve days, resulting in $83,907.08 in medical bills.

The hospital perfected its lien in compliance with section 52-401 of the Nebraska Revised Statutes Annotated in the amount of $83,907.08 plus finance charges on any settlement proceeds to which Rokes might be entitled from the tortfeasor by sending a Notice of Hospital Lien to Allied by certified mail shortly after 30 days of Rokes' discharge from the hospital. Allied received a copy of the Notice of Hospital on January 9, 1997.

Section 52-401 of the Nebraska Revised Statutes Annotated provides, in part:

> Whenever any person employs a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person claims damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the usual and customary charges of such physician, nurse, or hospital applicable at the times services are performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act.
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> In order to prosecute such lien, it shall be necessary for such physician, nurse, or hospital for such physician, nurse, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, or hospital claims a lien for such services, except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.
>
> A physician, nurse, or hospital claiming a lien under this section shall not be liable for attorney's fees and costs incurred by the injured person in securing the judgment, settlement, or compromise, but the lien of the injured person's attorney shall have precedence over the lien created by this section.[45]

Rokes ultimately settled with Allied for $225,000. Allied's bodily injury liability limit was $250,000. On January 22, 1998, Rokes accepted the settlement offer by signing the bottom of an acknowledgment letter from her attorney that advised Rokes that "we may need to pay claims from Medicare and the hospital from this money." On February 16, 1998, Rokes signed a Release.

Rokes' attorney, James Wilson, distributed the settlement funds to himself, Rokes and Medicare. Medicare received $183,814.79, out of which attorney's fees and costs were paid to Wilson in the amount of $75,569.95. Rokes received $30,000, with the remaining $11,186.21 also paid to Wilson as attorney's fees and costs. The settlement check that Allied issued did not include the hospital as a party payee.

The hospital did not receive any payment from Allied, Rokes or Rokes' attorney for its original bill of $83,907.08. After a $6,525.50 payment to the hospital by State Farm Insurance from Rokes' "Medpay" coverage, an unpaid balance of $77,381.58 remained due to the hospital.

The hospital commenced an action on July 1, 1998 against Allied seeking $83,907.08 plus interest. In applying Nebraska law, the district court found that Allied impaired the hospital and was directly liable to the hospital for its breach of that duty.[46]

With respect to the amount of damages to which the hospital was entitled, the court noted that it was unable to locate case law or statutory law to guide the calculation of damages upon an insurance company's breach of its duty not to impair a hospital's rights under its perfected lien.[47] In the absence of any guidance, the court decided to approach the calculation "using

general constructive trust principles."[48] The court explained that this meant that Allied was in effect holding the settlement fund in constructive trust for the benefit of the beneficiaries (Rokes, her attorney, Medicare, and the hospital) based on the principle that Allied could not be permitted to benefit from its wrongdoing.[49]

The court explained that, had Allied taken into account the hospital lien when it settled with the claimant for $225,000, Allied would have first distributed $11,186.21 from the settlement fund to Rokes' attorney for securing the settlement as allowed under section 52-401.[50] The statute provides that a hospital claiming a lien shall not be liable for attorney's fees and costs in securing the settlement, but "the lien of the injured person's attorney shall have precedence over the lien created by this section."[51]

Subtracting $11,186.21 for Rokes' attorney's fees and costs in securing the settlement, Allied would have then recognized that it had a remaining settlement fund of $213,813.79, with a $183,813.79 claim from Medicare and a $77,381.58 claim from the hospital, for a total of $261,195.37.[52] Because the settlement fund was insufficient to pay Medicare and the hospital, Rokes, the injured claimant, was not entitled to the money.[53]

The court observed that, in the absence of claims of priority as between Medicare and the hospital, Allied should have distributed the remainder of the settlement fund pro rata to Medicare and the hospital.[54] The court found that, because the claims exceeded the settlement fund, Allied should have paid the claimants (Medicare and the hospital) a percentage of what they claimed.[55] Dividing $213,813.79 (settlement fund amount) by $261,195.37 (amount of total claims) equals 81.86%.[56] Accordingly, the court ordered that Allied pay the hospital 81.86% of its claim, or $63,344.56, plus interest at the rate of 14% annually, computed monthly from and after the date Allied breached its duty not to impair the hospital lien by settling directly with the injured claimant, February 16, 1998, to the date of judgment.[57]

In a footnote, the court recognized that its ruling required Allied to pay beyond its $250,000 policy limit.[58] The court noted that it found no Nebraska cases dealing with an insurance company's breach of its duty not to impair a perfected hospital lien that tie damages for such breach to the offending insurance company's policy limit.[59]

The court found that, to the extent that Allied sought to assert affirmative defenses that the claims of Medicare and Rokes' attorney to a portion of Rokes' settlement proceeds had priority over the hospital's claim for payment, Allied had not pled those defenses.[60] The magistrate judge had previously denied Allied's post-pretrial-conference motion to amend its answer to allege those affirmative defenses.[61]

The court entered judgment in favor of the hospital and against Allied for $63,344.56, plus interest at the rate of 14% annually, computed monthly from and after February 16, 1998, to the date of judgment.[62] The court also entered judgment in favor of Allied and against the claimant, Rokes, in the amount of $30,000.[63] Furthermore, the court entered judgment awarding costs and post-judgment interest to the prevailing party, the hospital, in accordance with 28 U.S.C. § 1961 from and after the date of judgment as provided by law.

Under Nebraska law, the lien of the injured person's attorney who secures the settlement takes precedence over a hospital lien. Once those attorney's fees and costs are paid, the hospital then has priority to recover the amount of its lien. The amount of damages the hospital can recover was unclear in a Nebraska lien impairment action, and so the *Bryan Memorial Hospital* court applied general constructive trust principles to guide its calculation.

IV. Tennessee

A Tennessee appeals court, in an unpublished opinion, held that a hospital was entitled to recover one-third of the payments that an insurer made in a prior settlement with the third-party injured claimant.[64] In *Shelby County Health Care Corporation v. Baumgartner*, an insured tortfeasor was involved in an auto accident that injured the claimant who treated for over a month at Regional Medical Center in Memphis, Tennessee. While the claimant was still treating at the hospital, the hospital filed its initial Affidavit for Hospital Lien for the medical services it provided to the claimant in accordance with the Hospital Lien Act (Tennessee

Code Annotated Section 29-22-101 *et seq.*) As required under Section 29-22-102 of the Tennessee Code, the hospital sent a copy of the hospital lien affidavit to the claimant via registered mail.

Section 29-22-101(a) and (b) the Tennessee Code Annotated provides:

> (a) Every person, firm, association, corporation, institution, or any governmental unit, including the state of Tennessee, any county or municipalities operating and maintaining a hospital in this state, shall have a lien for all reasonable and necessary changes for hospital care, treatment and maintenance of ill or injured persons upon any and all causes of action, suits, claims, counterclaims or demands accruing to the person whom such care, treatment or maintenance was furnished, or accruing to the legal representatives of such person in the case of such person's death, on account of illness or injuries giving rise to such causes of action or claims and which necessitated such hospital care, treatment and maintenance.
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> (b) The hospital lien, however, shall not apply to any amount in excess of one third (1/3) of the damages obtained or recovered by such person by judgment, settlement or compromise rendered or entered into by such person or such person's legal representative by virtue of the cause of action accruing thereto.[65]

Section 29-22-104 of the Tennessee Code Annotated entitled "Impairment; damages" provides:

> (b)(1) Any acceptance of a release or satisfaction of any such cause of action, suit, claim, counterclaim, demand or judgment and any settlement of any of the foregoing in the absence of a release or satisfaction of the lien referred to in this chapter shall prima facie constitute an impairment of such lien, and the lienholder shall be entitled to an action at law for damages on account of such impairment, and in such action may recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such hospital care, treatment and maintenance.

Under the terms of the Hospital Lien Act, within 30 days of the claimant's discharge, the hospital filed an Amended Affidavit for Hospital Lien. The amended affidavit added the claimant's UM carrier, Nationwide Insurance Company, and updated the amount of the hospital lien to $529,840.30, which was the total cost of the medical services provided to the claimant. The hospital mailed a copy of the amended hospital lien via registered mail to the claimant and his UM carrier. The hospital, however, did not name either the tortfeasor or his insurance carrier on its amended lien. The record did not indicate that the hospital had actual knowledge of either the tortfeasor or his insurer at the time the hospital filed its amended hospital lien.

Shortly after the hospital amended its lien, both Nationwide and the tortfeasor's insurer, Hartford, entered into settlement agreements with the claimant and his wife. Under the settlement agreements, both insurance companies agreed to pay the claimants the limits of their respective insurance policies. Specifically, Nationwide paid its $25,000 UM policy limits and Hartford, in turn, paid the claimants its $100,000 bodily injury liability limits.

When Nationwide entered its settlement agreement with the claimants, it had actual knowledge of the hospital's lien. The record, however, did not reflect that Hartford had knowledge of the hospital's lien. The court noted that Hartford did not check with the Shelby County Circuit Court Clerk's office to determine whether the hospital had filed a lien before Hartford paid its $100,000 policy limits to the claimant. In total, the claimants directly received $125,000 from the insurance carriers. No one paid any money to the hospital or any other medical provider.

After learning of the settlement, the hospital filed a lawsuit against the claimant's wife. As damages, the complaint sought the cost of medical services provided to the claimant, plus attorney fees of $176,506.23, plus interest and costs. The hospital subsequently filed its first amended complaint, adding the injured claimant and his UM carrier, Nationwide, as defendants. The amended complaint sought $526,518.70, the approximate total cost of the hospital's lien, based on breach of contract and impairment of the hospital lien in

violation of the Hospital Lien Act. The hospital subsequently filed a second amended complaint adding Hartford as a defendant and asserting claims against it for the full amount of the hospital lien as damages for the impairment of its lien.

The first issue the court addressed was whether the hospital was required to use its due diligence in ascertaining the identity of persons or corporations who may be liable for the patient's injuries. The court found that the hospital did not have a duty under Section 29-22-102 to conduct an inquiry into the identity of potential third-party tortfeasors to perfect its hospital lien and that Hartford had constructive notice of the hospital lien.[66]

With respect to the damages recoverable for impairing the hospital lien, the hospital contended that Hartford and Nationwide were jointly and severally liable for the full amount of the claimant's medical expenses as damages for impairment of the hospital's lien. The hospital based its argument on Section 29-22-104(b)(1), which states that, if a lien is impaired, the lienholder "may recover. . .the reasonable cost of such hospital care, treatment and maintenance."

The insurance carriers argued that Section 29-22-101(b) limited the application of a hospital lien to "one third (1/3) of the damages obtained or recovered" must be read in conjunction with Section 29-22-104(b)(1), and that the hospital's recovery for the impairment of its hospital lien should be limited to one-third of the amount paid to the claimants.

The insurance carriers argued in the alternative that, should the court find that Section 29-22-101(b) did not limit the hospital's damages, then in no event should the hospital's recovery exceed the insurance companies' respective policy limits. The carriers asserted that, at no time, did they contract to be liable for more than the policy limits.

The court, in examining the interplay between Section 29-22-104(b)(1) and Section 29-22-101, observed that these two provisions of the Hospital Lien Act refer specifically to two different financial amounts.[67] Sections 29-22-101(a) and 29-22-104(b)(1) refer to the "reasonable charges" or the "reasonable cost" of the hospital care and treatment.[68] Section 29-22-101(b) states that the hospital lien "shall not apply to any amount in excess of one third (1/3) of the damages obtained or recovered by such person."[69] In applying these statutory provisions, the court noted that the total amount of damages that Nationwide and Allied paid to the claimants was $125,000, which was far less than the approximately $530,000 in the reasonable cost of medical care provided by the hospital for the claimant.[70]

The court pointed out that the cost of the medical services may not always exceed the damages paid.[71] The court explained that, for instance, an ill or injured person may receive a payment from an insurance company or otherwise that exceeds the reasonable cost of his medical care where he receives payment to settle a claim for pain and suffering or other damages.[72] Conceivably, " 'one third of the damages obtained or recovered' " could exceed " 'the reasonable cost of [the] hospital care.' "[73] The court thus concluded that the "damages obtained" under section 29-22-101(b), or the "settlement" made in impairment of the lien under Section 29-22-104(b)(1), may be more, or may be less, than the reasonable cost of the medical care, depending upon the circumstances.[74]

The court noted that, although the hospital focused on the portion of the statute describing the extent of damages that may be available, it was important to define what the statute granted.[75] The granting language stated that " 'the lienholder shall be entitled to an action at law *for damages on account of such impairment*. . . .' "[76] The definition of "damages" was "pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury . . . through the unlawful act or omission or negligence of another.' "[77] Under this definition, the pecuniary compensation was linked to the unlawful act of another.[78]

The court described that, had Hartford and Nationwide honored the hospital lien as required under Section 29-22-101(b), the hospital would have received one-third of the settlement monies paid to the claimants.[79] Even though Section 29-22-101(b) does not apply to an impairment action, the court found that "it circumscribes the 'scope of [the hospital's] underlying right.' "[80]

The hospital argued that its underlying right should be measured by Section 29-22-101(a), which gives the hospital a statutory lien "for all reasonable and necessary charges for hospital care, treatment and maintenance." The hospital contended that this amounts to a legislative directive that a party who impairs a hospital lien "must pay the full amount of the hospital lien filed for the medical services rendered to a patient."

The court agreed with the hospital that the hospital had been damaged by the claimants' failure to pay for the medical services provided to the claimant. The court also said, however, that payment of the full amount of the medical costs had never been the responsibility of either Nationwide or Hartford.[81] Rather, under the Hospital Lien Act, Hartford and Nationwide each had a duty to honor the hospital's lien by paying one-third of the claimants' settlement monies to the hospital, an amount which was, in the case, far less than the total medical expenses.[82] One-third of the settlement money is the amount that the hospital lost "on account of [the] impairment of the lien."[83] The court reasoned that requiring the insurance companies to pay the entire cost of the hospital's medical care would result in a remedy that is incongruent with the hospital's underlying right vis-à-vis the insurance companies.[84]

The court further explained that Section 29-22-104(b)(1) states that a hospital "*may* recover . . . the reasonable costs of such hospital care, treatment and maintenance."[85] Use of the word "may" in a statute is typically construed as permissive rather than mandatory.[86] Under Section 29-22-104(b)(1), the hospital may recover the costs of the hospital care, but only if such an award would reflect the hospital's " 'damages on account of [the] impairment' " of its lien.[87] The court noted that this could occur when " 'one third (1/3) of the damages obtained' by the ill or injured person equals or exceeds the cost of the hospital care."[88]

With respect to whether the hospital could recover its attorney's fees, the court referred to the legislative history of Section 29-22014(b)(1) noting that the legislature previously deleted a provision of the bill requiring a party who impairs a lien to pay the hospital's attorneys fees.[89] The court explained that the legislators did this because they assumed that an impairment of a hospital lien by an entity such as an insurance company would likely be done inadvertently, and the legislature did not wish to " 'to penalize a person who simply made a mistake.' "[90]

The court held that the hospital may recover only the damages that are attributable to the impairment of its lien by the insurers, in light of the fact that, had the hospital lien been honored, the hospital would have received only one-third of the amounts paid to the claimants by the insurers.[91] On that basis, the court reversed the trial court's award of $100,000 against Hartford.[92] The court also reversed the trial court's award of $8,333.33 against Nationwide because it was unclear from the record whether the hospital also sought "consequential damages or other damages" against Nationwide.[93] The court noted that, in the absence of such consequential damages or other damages, the amount of the trial court's award against Nationwide would be correct under the Hospital Lien Act.[94]

Conclusion

An insurer that fails to account for a hospital lien in a settlement with a claimant may have to pay the hospital some amount toward the lien or the full amount of the lien. This is true even if the insurer previously exhausted its policy limits when it settled with the claimant.

The Supreme Court of Alabama, for instance, found that an insurer that impaired a hospital lien had to pay the entire amount of the hospital bill, even though the prior settlement amount with the claimant was approximately one-tenth of the hospital lien amount. In Florida, the amount that the hospital was entitled to receive from the insurer was based upon the insured's collectability. Where the insured was uncollectable, the hospital was entitled to recover the $10,000 policy limits because that was the amount that the hospital would have ever been able to collect from the tortfeasor. In Nebraska, a federal district court found that the insurer should have paid Medicare and the hospital a percentage of what they claimed by dividing the total settlement fund, less the claimant's attorney's fees in securing the settlement, by the total amount that Medicare and the hospital claimed. In Tennessee, a hospital was entitled to receive one-third of the prior

settlement amount against an insurer, as provided in the applicable Hospital Lien Act.

Developing familiarity with the applicable hospital lien laws and determining the existence of a hospital lien early in a claim are vitally important when insurers are inclined to settle claims. Having a working knowledge of the hospital lien laws may help avoid some of the pitfalls associated with settlements that impair liens.

Endnotes

1. *See* Shelby County Healthcare Corp. v. Nationwide Mut. Ins. Co., 325 S.W.3d 88, 92 (Tenn. 2010).
2. 904 So. 2d 1242 (Ala. 2004).
3. *Id.* at 1244 (quoting ALA. CODE § 35-11-370 (1975)).
4. *Id.* at 1248.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* (original emphasis).
9. *Id.*
10. *Id.* at 1249 (Nabers, C.J., concurring in part, dissenting in part).
11. *Id.* (original emphasis) (Nabers, C.J. concurring in part, dissenting in part).
12. *Id.*
13. *Id.* (original emphasis).
14. *Id.*
15. *Id.*
16. *Id.* at 1249.
17. *Id.*
18. Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Fla., 97 So. 3d 204 (Fla. 2012).
19. *Id.* at 208 (citing Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla., No. 01-2006-CA-3631 (Fla. 8th Cir. Ct. final judgment filed Feb. 7, 2008)).
20. *Id.*
21. *Id.*
22. *Id.* at 208.
23. This article focuses on the damages recoverable in a hospital lien impairment action. Accordingly, any discussion concerning the courts' the constitutionality of the Alachua County Hospital Lien Law and Alachua County Hospital Lien Ordinance is purposely limited here.
24. *Id.* at 209 (quoting Ch. 88–539, §§ 1, 4, Laws of Fla.; Alachua Cnty. Code §§ 262.20, 262.23).
25. *Id.* at 212.
26. Brief of Appellee/Cross-Appellant Mercury Ins. Co. of Florida, 2010 WL 1019083 at *7 (Fla. March 2010).
27. *Id.* (internal citation omitted).
28. *Id.*
29. *See* Armstrong v. Allstate Indemnity Co., 653 So. 2d 1121 (Fla. 1st DCA 1995).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 1122.
34. 510 So. 2d 635 (Fla. 3d DCA 1987).
35. *Id.* at 636.
36. *Id.*
37. *Id.*

38. *See* Southeastern Fidelity Ins. Co. v. Earnest, 395 So. 2d 230 (Fla. 3d DCA 1981).

39. *Id.* at 231.

40. *Id.* at 213 (quoting Alachua Cnty. Code § 262.23).

41. *Id.* at 214.

42. *Id.*

43. *Id.* (internal citation omitted).

44. 163 F. Supp. 2d 1059 (D. Neb. 2011).

45. *Id.* at 1062 n. 4 (quoting, in part, Section 52-401).

46. Bryan Memorial Hospital, 163 F. Supp. 2d at 1066-67.

47. *Id.* at 1067.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1067-68.

57. *Id.* at 1068.

58. *Id.* at 1068 n. 9.

59. *Id.* at 1068.

60. *Id.*

61. *Id.*

62. *Id.* at 1069.

63. *Id.*

64. Shelby County Health Care Corp. v. Baumgartner, 2011 WL 303249 (Tenn. Ct. App. 2011).

65. *Id.* at *9-10 (quoting TENN. CODE ANN. § 29-22-101(a) and (b)).

66. *Id.* at *13.

67. *Id.* at *16.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at *17.

76. *Id.* (original emphasis).

77. *Id.* (citing Nationwide Mut. Ins. Co., 325 S.W.3d at 97).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at *18.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (original emphasis).

86. *Id.*

87. *Id.*

88. *Id.*

88. *Id.*

90. *Id.* (quoting Statement of Rep. Runyon, House Session, Feb. 20, 1970).

91. *Id.* at *19.

92. *Id.*

93. *Id.*

94. *Id.* ■

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