

page 2
Consumer-protection claim OK to
file in med-mal context

Deleting photos from your cell
phone could compromise your
injury case

page 3
Misrepresentation on insurance
application bars claim

page 4
Car wreck near industrial park
brings substantial recovery

Consumer Safety
summer 2021

Legal Matters®

How might liens impact my PI claim?

If you have been hurt and someone else may be responsible, it's very important to talk to a personal injury attorney about your rights. A good attorney will also be able to counsel you on the issue of "liens."

What is a lien? It's a claim that a third party may have on a portion of your recovery. For example, doctors, hospitals and other health care providers who treated you for your injuries might have a claim on part of your recovery if they haven't been paid. Similarly, your health or auto insurance company may have a lien if they have paid for your care. Additionally, government health insurers like Medicaid and Medicare could have a claim, as could the Veterans Administration or state child-support agencies.

But don't assume that just because there may be a lien that it's not worth bringing a case. Your attorney may be able to minimize the bite they take from your settlement or jury award, particularly if the lienholder is overreaching.

For example, in 2016 a woman named Jeanette Peterson went to the emergency room at a hospital in suburban Detroit complaining of a headache she had been suffering since the previous night. She also told the physician's assistant she was feeling "heaviness" in her chest and shortness of breath.

An EKG allegedly showed some abnormalities, as did lab results, but later in the day Peterson told the PA she felt better and she was discharged without further treatment. A month later, Peterson suffered a cardiac arrest that left her with brain damage. Her guardian brought a medical malpractice claim on behalf of the hospital, which settled. But



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after the trial judge entered final judgment, Medicaid stepped in and tried to lay claim to a significant portion of the recovery, asserting a lien empowering it to recoup all the medical expenses it had paid.

Medicaid's asserted lien represented 65 percent of the settlement, cutting deep into what Peterson's family had hoped would compensate her for her pain and suffering while helping cover her future care.

The family argued that Medicaid was entitled only to a pro rata share of the settlement. In other words, because they settled for 21 percent of the total value of Peterson's case, Medicaid was entitled to

continued on page 3

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Consumer-protection claim OK to file in med-mal context

Many states have what are known as consumer-protection statutes, which allow people to take legal action against businesses for harm they suffer as a result of “unfair and deceptive” conduct in the marketplace. The stakes can be significant. Under some of these laws, the courts will multiply the consumer’s damages two or three times and order the offending company to pay the consumer’s attorney fees. Although consumer-protection laws typically do not apply to patients who have been harmed by the malpractice of doctors and other medical providers, a recent Massachusetts case shows that in certain unique circumstances they might.

The case in point involved 70-year-old Patricia Marble, who received home hospice care for pulmonary disease through Plymouth Hospice, a local subsidiary of national home health-care giant Amedysis. According to Marble, doctors and staff who worked for the facility kept plying her with high doses of fentanyl and Vicodin, keeping her in a stupefied state for five years. During this time, they allegedly falsely certified on nearly two dozen occasions that Marble had a life expectancy of less than six months and was thus eligible for hospice care.

According to Marble’s family, the drugs prevented her from leaving the house or having normal relationships with her husband, family and friends. Additionally, the drugs allegedly left her constipated and unable to breathe, causing her to need

supplemental oxygen.

Marble alleged that hospice staff was doing this under financial pressure from supervisors to generate Medicare billings for the company.

Ultimately Marble’s family had her see an outside physician over the objections of hospice staff and she was diagnosed as having received unusually high doses of opiates. Once she left Plymouth’s care, she rehabilitated and presently leads a normal life.

Marble took the company to court, claiming medical malpractice and violation of Massachusetts’ consumer-protection law.

The company argued that her claims should be thrown out because they were “preempted” by the Medicare Act, which says Medicare Advantage plans are regulated entirely by the federal government.

But a Superior Court judge disagreed, pointing out that Marble got her Medicare benefits directly from the government, not from a Medicare Advantage private insurer. Additionally, he said the Medicare Act does not bar Medicare providers from being held accountable for substandard care.

But perhaps most significantly, the judge said that the consumer-protection claim could move forward because it went beyond poor care and into the realm of unfair and deceptive conduct motivated by financial gain.

The law may differ from state to state, however. So talk to an experienced attorney where you live to learn more.

We welcome your referrals.

We value all of our clients.

While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

Deleting photos could compromise your injury case

If you have been hurt in an accident and hope to hold someone else accountable for your injuries, be sure to preserve all photos and data on your phone and other electronic devices in the weeks following the incident. That’s because, as a recent case from New York shows us, failure to do so could compromise your case.

In that case, a man named Felix Luzuriaga claimed he was injured when another driver struck his vehicle. He took the driver to court seeking compensation for his alleged harm.

In between filing his complaint and trial, Luzuriaga gave a deposition. In other words, he testified under oath outside of court with a court reporter taking a transcript. During the deposition, the other side asked him to preserve 271 images on his cell

phone that purportedly depicted his activities following the accident (presumably because they might cast doubt on the severity of his harm).

But when Luzuriaga was asked to produce the photos, 39 were missing. According to Luzuriaga, his wife inadvertently deleted the images after he lent her his phone. The other driver, however, asked the court to give an “adverse inference” charge to the jury. In other words, he asked the judge to tell the jury that they could infer the missing photos would hurt Luzuriaga’s case.

Luzuriaga appealed, but the state appellate court upheld the ruling.

The laws may differ from state to state, but to be safe be sure to preserve all data.

Misrepresentation on insurance application bars claim

A recent case out of Michigan should serve as a warning to all motorists that if you want your attorney to be able to help you with an injury claim stemming from an auto accident, you had better be completely transparent in filling out your insurance application, and be sure your agent is too.

The case in question involved a woman named Michelle McCarthy who collided with another woman's vehicle while driving through an intersection.

She suffered injuries in the crash and sought PIP (personal injury protection) benefits from her no-fault auto insurer, Everest National Insurance Company.

Her insurer refused to pay her PIP benefits, leading her to file a complaint in court alleging that she was entitled to the benefits under her policy as well as personal injury damages from the other driver.

The insurer moved to have the case dismissed, arguing that McCarthy had not disclosed on her insurance application that she lived with her father and her policy should be considered cancelled as a result of the misrepresentation. Meanwhile, the other driver moved to have the case dismissed as well, arguing that because McCarthy's policy was void, her car was technically not insured at the time of the crash and thus state law barred her from bringing

the claim.

The trial judge ruled in their favor and threw out the case.

On appeal, McCarthy argued that the misrepresentation was the fault of her insurance agent, who filled out her application. She also argued that the misrepresentation was not material.

The Michigan Court of Appeals disagreed and upheld the trial judge's decision.

As the court pointed out, the agent sold insurance for a number of companies and thus was acting as McCarthy's representative, not the insurer's, and if she made any misrepresentations based on her agent's advice Everest could still rescind her policy. Additionally, the representation was material, because McCarthy's premiums would have been higher if the insurer had known she lived with her father, who would likely be an additional driver of the car.



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How might liens impact my PI claim?

continued from page 1

only 21 percent of its lien.

The judge ruled in the family's favor, holding that Medicaid could only recover the parts of the settlement allocated to past medical expenses, not portions attributable to future expenses or pain and suffering. He also sanctioned the agency for bringing a "frivolous" motion for relief, finding that it should have known better. The Michigan Court of Appeals upheld the ruling.

That case involved Medicaid, but hospitals and private medical practices assert liens on recoveries too, usually when the patient has no insurance and is getting billed directly. In some states, they can approach an injured patient who they suspect may have a legal claim and ask them to sign a waiver agreeing that they do not want Medicaid, Medicare or their insurer billed for their care. This enables the hospital to reach into the patient's recovery for the full cost of its care rather than satisfying itself with Medicaid, Medicare or a



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health insurer's lower reimbursement rates.

If you are presented with such an agreement, it is critical that you talk to an attorney before signing anything and compromising part of a potential recovery. Also be sure your lawyer is aware of any parties you know of who might have a claim on any part of your recovery. A good attorney may be able to negotiate with lienholders, getting them to agree to accept a smaller amount of your settlement in satisfaction of their claim.



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Car wreck near industrial park brings substantial recovery



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Illegally parked vehicles are serious hazards that can interfere with drivers' vision and cause serious or even fatal accidents.

This happened in 2017 when 53-year-old Yvonne Douglas and her son Ian were driving through Kansas City on their way to help set up for a Halloween event in nearby Indepen-

dence, Missouri.

As they proceeded through an intersection, a trailer cab hit Douglas's car on the passenger side, flipping the vehicle over. She died at the hospital, and her son wound up in intensive care.

As it turns out, there was a stop sign at the intersection which Douglas did not see because several semi-tractor trailers parked in a no-parking zone had blocked her view. The trucks also made it impos-

sible for her to get a decent view of oncoming traffic.

A trucking company apparently had been shuttling tractor trailers in and out of loading bays in a nearby industrial park all that day and illegally parking them on the street in the zone in question. Police had apparently warned the company in the past not to park trucks there.

The Douglas family sought to hold the trucking companies accountable for Yvonne's death and Ian's injuries.

The case was resolved out of court, with the defendants agreeing to pay more than \$2.5 million to be split among Yvonne's survivors, plus \$450,000 for Ian's injuries.

The result in every case depends on the underlying circumstances of the accident. But if you or someone you care about has been hurt in an accident that may be due to illegally parked vehicles, a personal injury attorney who is experienced with motor vehicle crashes can help you determine your rights.