

The Impact of Medi-Cal Liens on Wrongful Death Actions

by Mitzie Dobson

Prior to 2005 the question of whether Medi-Cal could recover a lien in a wrongful death lawsuit was unsettled. The Second Appellate District ruled in 2003 that Medi-Cal could not recoup on its lien in a wrongful death action.

That same year, 2003, the Fourth Appellate District ruled that Medi-Cal could recover its lien. The issue was settled in 2005 by the California Supreme Court in Fitch v Select Products, (2005) 36 Cal.4th 812.

Logically, given the fact that plaintiff cannot recover medical expenses for a wrongful death claim, the Supreme Court ruled that Medi-Cal cannot recover a lien for medical expenses from plaintiff in a wrongful death action. However, if the decedent's personal representative has a survival action, Medi-Cal can recover its lien in the event of a settlement or judgment.

The 2005 Fitch ruling has raised a number of interesting issues in the context of survival and wrongful death actions in California.

One issue is the impact a Medi-Cal lien has on survival/wrongful death actions. We have seen a number of cases where the only recoverable damages in the survival action are medical expenses. If the decedent was disabled and/or unemployed at the time of the injury there likely would be no viable claim or recovery for lost earnings. If all the decedent's medical care from injury to death was covered by Medi-Cal, does it make sense for the plaintiff to proceed with a survival action?

As an illustration, if the decedent's medical expenses were substantial, in the range of \$400,000, the medical expenses alone would inflate the monetary value of a wrongful death medical malpractice action from \$250,000 to \$650,000. Such an increase could significantly reduce the likelihood of a settlement to the detriment of the plaintiff. Despite the fact that the monetary value of a survival/wrongful death action in this circumstance would be much higher than for a wrongful death case alone, there may be no benefit to the surviving plaintiff.

Medi-Cal will reduce its lien by 25% for attorneys fees and also for costs in securing the lien. If the lien is reduced by this amount and the excess goes solely to the attorney, plaintiff's attorney would benefit from the increased attorney's fees due to the value of the Medi-Cal lien without an increased monetary benefit to the plaintiff.

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In this circumstance, plaintiff's interests may very well be in conflict with the interests of plaintiff's counsel.

On the other hand, if the Medi-Cal lien is significantly larger than the general damages, plaintiff may benefit from settling a survival/wrongful death action with an existing Medi-Cal lien. Pursuant to Welfare & Institutions Code, section 14124.78, Medi-Cal can recoup only 50% of the plaintiff's net settlement, following the reduction for attorney's fees and litigation costs. If the settlement or judgment includes \$250,000 general damages plus \$400,000 for the Medi-Cal lien, and the 50% rule is applied, plaintiff could end up with more than he would have received with general damages alone.

If the plaintiff agrees to a dismissal of the survival action, Medi-Cal can not recoup its lien from the plaintiff. However, the Department of Health Services can still proceed against a doctor, hospital and/or other liable third party for the value of benefits pursuant to Welfare & Institutions Code section 14124.70 et seq. The statutory scheme and case law provide that an action can be filed against a liable third party for the injury within three years of the accrual of the action. The Second Appellate Court in Kizer v. Ortiz, (1990) 219 Cal.App.3d 1055, found that the statute of limitations on actions to recover a Medi-Cal lien commenced when the

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Department of Health Services received notice of a judgment or settlement.

Clearly, the most efficient way for the Department of Health Services to recover the value of the Medi-Cal benefits is to file a lien for recovery in the beneficiary's action against the allegedly liable third party. Because Medi-Cal is precluded from so doing in a wrongful death case where medical expenses cannot be recovered, Medi-Cal may choose to seek the value of Medi-Cal benefits independently from the doctor, hospital and/or other party following a settlement or judgment in favor of plaintiff.

When a Medi-Cal lien exists and the only cause of action is one for wrongful death, plaintiff should be precluded from attempting to claim the amount of the lien at mediation or trial. We have found that many times plaintiff's counsel is unaware of the ruling in *Fitch* and will attempt to address the lien as an element of damages at mediation and trial. If the case proceeds to trial, the appropriate motions in limine should be filed so that plaintiff does not attempt to introduce evidence of a Medi-Cal lien at the trial of a wrongful death action. ■

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