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BEWARE THE LIEN YOU DON'T KNOW

Like the dog that didn't bark, it's the lien you never found that can come back and bite you.

The Houston First District Court of Appeals recently held that a hospital lien, filed only minutes before the settlement checks were written, was effective, though it was not yet indexed by the clerk, and could not have been found by the insurer. *Mem'l Hermann Hosp. Sys. v. Progressive County Mut. Ins. Co.*, Dkt. 2011 Tex. App. LEXIS 1978 (Tex. App. Houston 1st Dist. Mar. 17, 2011, no pet. h.).

In this case of first impression, the question posed is, "Is it necessary for the clerk to index the lien before it becomes effective, or is the hospital's mere filing enough?"

FACTS OF THE CASE

Progressive County Mutual Insurance Company (Progressive) settled a claim brought by Carlos Martinez against its insured related to a car accident. Memorial Hermann Hospital in Houston (Hermann) had filed a hospital lien for the cost of Martinez's medical treatment just half an hour before Progressive issued the final settlement check.

To make matters worse, Progressive had initially issued the check, on November 20, 2007, actually including Hermann as a payee. Because Martinez and his lawyer objected that there was no lien, Progressive reissued the check, at exactly 3:23 p.m. on December 12, 2007, leaving off Hermann. Thirty minutes before, on the same date, Hermann had filed its notice of lien with the Harris County Clerk's Office.

Before issuing each check, Progressive dutifully conducted lien searches on the county clerk's website, first on November 19, before issuing the first check. On the afternoon of December 12, Progressive again searched the website not once, *but twice*, first at 2:25 p.m., and again at 3:30 p.m., immediately after issuing the check. None of the searches revealed the existence of the lien on the Martinez settlement.

The clerk did not “index” the Hermann lien until December 17, 2007. According to the lien statute, the clerk must index the record in the name of the patient. Tex. Prop. Code § 55.005. That is, not until the lien is indexed, is it searchable.

A release is rendered invalid if it is in derogation of a hospital lien. *See* Tex. Prop. Code § 55.007, potentially subjecting everyone, including the insurer that already paid on the settlement, to a law suit to enforce the lien.

In the ensuing action, Progressive moved for summary judgment, arguing that because Hermann could not show that the Harris County Clerk had *indexed* its hospital lien before Progressive paid out the settlement, it could not enforce the lien. The trial court granted the motion, and Hermann appealed.

THE COURT’S DECISION

The Texas Hospital Lien Law allows a hospital to place a lien on the claim of an individual who receives medical care for injuries from an accident caused by the negligence of another. The statute says:

(a) To secure the lien, a hospital or emergency medical services provider must file written notice of the lien with the county clerk of the county in which the services were provided. The notice must be filed before money is paid

(c) The county clerk shall record the name of the injured individual, the date of the accident, and the name and address of the [lienholder] and shall index the record in the name of the injured individual.

Tex. Prop. Code § 55.005

In granting summary judgment, the trial court had interpreted the requirement that the lien notice be filed before money is paid, in subsection (a), as applying to subsection (c), the clerk’s recording and indexing requirement.

Applying standard rules of statutory construction – relying first on the plain meaning of the words chosen by the legislature – the Court explained that section 55.005 provides that a lien is secured as soon as the “lienholder properly files with the county clerk a written notice of lien that complies with the statutory requirements.” Subsection (a) contains the only restriction on timing relating to the lien. “[N]otice must be filed before money is paid” This language refers to the action of *filing*, and does not refer to the county clerk’s obligation. Thus, only the hospital is responsible for filing the lien notice.

That is, the lienholder, through its own action (filing the lien) triggers the lien. Nothing else need happen. Subsection (c), according to the Court, requires the county clerk to index the lien, but does not set any deadline. Progressive argued that section 13.002 of the Property Code, which declares that a properly recorded instrument is notice to all and that it must be subject to inspection by the public, is evidence that the legislature intended that a lien be properly recorded – to provide the public with adequate notice and searchability. According to this argument, because recording is obligatory, it is the recording rather than filing that is critical.

The Court agreed that the duty of proper recordation belongs to the clerk under the property code. But the code also makes the **county clerk liable** for damages and civil penalties if the clerk violates the specified recordation requirements. Tex. Prop. Code Ann. § 11.004(b). If recording were the triggering event, the clerk is potentially liable under precisely the circumstances presented in this case.

The Court rejected this argument. The Court supported its conclusion by referring to other statutory lien provisions that emphasize the lienholder's filing responsibility, but *expressly* disclaim any consequence from a delay or error in the clerk's ministerial duty to index lien notices. Further, the Court explained, the various lien statutes consistently instruct the clerk to record liens according to the date and time of the *filing* or *receipt*, not by the date of indexing or recording.

The Court explained away the apparent inequity of the burden on those who would settle an injury claim by explaining that the Legislature intended to prefer hospitals:

Our interpretation of section 55.005 comports with the law's purpose, which is to provide hospitals an additional method of securing payment for medical services, thus encouraging the prompt and adequate treatment of accident victims.

Because the lien was *filed*, albeit minutes before the check was issued, it was instantly effective.

WHAT DOES THIS MEAN?

We don't know what may happen if this is appealed to the Texas Supreme Court, but it's an important case.

It is significant to any lawyer representing a party to a settlement where there might be a hospital lien because Texas Disciplinary Rule of Professional Conduct 1.14(b) suggests that, once in possession of funds that are subject to a lien, an attorney is obligated to notify the lienholder before releasing any funds.

Of course only hospitals and limited others can claim this lien; and the lien holder has to otherwise strictly follow the statute to claim the lien. So settlement in face of a hospital lien *might* still be enforceable if the lien turns out to be invalid.

But all parties must be mindful of the hidden lien because if a valid lien is ignored, the original cause of action remains *open*, regardless of what releases have been signed or settlements paid. In addition, the hospital *may* have a right to pursue all parties, including the debtor, the attorneys involved, and the Defendant. See Kostka, *Negotiating The Hospital Lien Minefield* 68 Tex. B. J. 128, 130 (February, 2005).

One way to avoid these outcomes at settlement is to notify – or require that the Plaintiff notify – all potential hospital lien holders, identifiable in the medical records, and require that all liens be paid or released.

And remember, it's the liens you don't know that are the problem.



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