



# Medical liens: Necessary evil or litigation advantage?

*The economy, the Supreme Court and HMOs combine to accelerate the use of medical liens in personal injury cases*

BY **STEPHEN ELLISON**

Triggered in part by a 2011 California Supreme Court ruling, a trend is growing in plaintiffs' law practice within the state: seeking lien-based medical care for personal injury clients.

Many people injured in accidents require extensive medical treatment – including emergency hospital care, surgical procedures, physical therapy, rehabilitation, chiropractic care and pharmacy services – and not all are able to pay for these services through their health plans or bank accounts.

Today, however, an increasing number of physicians and other medical care providers are willing to provide their services on a lien basis. Personal injury clients without health insurance, or those who aren't getting the timely or comprehensive treatment they need through their HMO health plan, can receive quality care from providers referred by attorneys. The services are paid for when the clients receive a settlement or a judgment is satisfied.

The main advantage for doctors and other providers to treat on a lien basis is they are able to bill at the "usual and customary" rate, which is almost always higher than the negotiated fees paid by health insurers, though they likely will be asked to negotiate down from the higher rate.

## Referral services

Oftentimes, to optimize the process, third-party services get involved to connect attorneys and their clients with physicians who work on liens. There are several business models for these third-party services, one of which is the referral

service. The referral services are paid flat monthly fees by doctors who wish to be represented by the networks, regardless of the number of patients that are sent to the doctors through the service.

"There are no percentages, no bonuses, no future or deferred payments after a case settles," explains Samantha Parker, president and CEO of Doctors on Liens, a referral company serving dozens of cities throughout Southern California. "I don't even know when the lien settlement takes place or how much it's for. Our job, plain and simple, is to market doctors. That's what they're paying us to do. And that job stays the same, regardless of whether we bring them one case or a hundred."

For a number of reasons – including changes in the law – these services recently have seen an uptick in business.

"With the change in the economy, more attorneys are now taking personal injury cases and, as a result, more doctors are jumping on the bandwagon and claiming they can work on a lien," Parker says. "Unfortunately, though, lien work is not as easy as one would think, and many of these doctors just aren't equipped to handle it or have unrealistic expectations of what's involved. That's why businesses such as mine, at least the ones that have a proven track record and a respected stable of doctors who are legitimately on their service, are so desirable to the attorney."

Another widely used referral service, Power Liens, claims to be the largest network in California for lien-based care. Its Web site claims to list every doctor in the state who works on liens. Power Liens CEO P.J. Javaheri, an attorney himself, says that providers who meet certain

standards get preferred listings. Javaheri says his company differs from others mostly in its range of medical offerings.

"Unlike (other services), we have over 22 different specialists," he says, adding that many referral companies deal strictly with orthopedic surgeons and chiropractors. "We are a one-stop shop for personal injury attorneys looking for lien-based care."

Power Liens allows any doctor who works on liens to be listed free. The company says that if a doctor passes a certain level of criteria, they become a preferred provider, with a highlighted listing on the web site which means they can be the only neurologist or orthopedic surgeon or chiropractor listed within a certain geographical area. The criteria include experience in dealing with personal injury cases; properly written medical examination reports that have been reviewed by the service; and two references from personal injury attorneys who say the doctor works well with attorneys.

"Personal injury attorneys want to work with a doctor who is friendly to PI attorneys, right?" Javaheri says. "They want a doctor who knows how to write a medical examination report – he knows what he needs to write in the report that might be needed in trial or what will be good to support his claims in a deposition."

For the preferred listings, Javaheri says, Power Liens collects a monthly marketing fee.

"We don't make money on the lien," he says. "We allow the attorney to contact the doctor directly, and we allow the attorney to negotiate the lien with the doctor directly. We only help facilitate that initial relationship."



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## Medical group providers

According to a medical center administrator who has been dealing with medical liens in Los Angeles for 25 years, it is the bad economy that has been driving the medical lien business more than any new law. The administrator, who requested anonymity to avoid having his center pegged as a “personal injury mill” by the insurance defense bar, believes “when people are out of work and get into an accident, even a small one, they have the time to see a lawyer and go for medical treatment. When they’re working, they’re less likely to take time off from the job to see an attorney and keep their medical appointments – unless it’s truly a disabling injury.”

As to seeing patients who have insurance but whose attorney suggests they don’t use it: “When we get patients who have insurance, it’s usually because they are in an HMO or on Medicare. The insurer won’t authorize the surgical care, and if they do, good luck getting the medical records and reports you need to settle. And God forbid you need the treating HMO doctor for a deposition.”

Medical groups are not a referral service, the administrator points out. “We have our own doctors, and because we know the personal injury business, we make certain that lawyers get the medical reports on time that they need for settlement. We’ll also make sure that doctors are available for deposition as required.”

One common misconception among lawyers new to PI practice is that doctors who “take liens” work on a contingency basis. “Not so,” says the administrator. “Our doctors treat the PI patients on a lien, not on some contingency fee arrangement. We provide the care today because we expect to get paid later. Patients sign an agreement that they are fully responsible for the medical bills. It’s an enforceable agreement.”

At the same time, he acknowledges that because “some lawyers don’t fully investigate a case before referring the client to a doctor,” and some clients are not

forthcoming with their attorney about their pre-existing conditions, “a lot of stuff goes bad” and has to be written off by the medical group.

“We don’t want to create hardship by pursuing collection against the injured party who doesn’t get a settlement.” The administrator is quick to point out, “we write-off bills on a case-by-case basis. The write-off is not contractual, and it’s not done to please the attorney. Really good doctors who will do treatment and surgery on a lien can be hard to find. We have to protect their interests whenever possible.”

The administrator went on to say, “What we need by lawyers and doctors is moderation. There’s a certain truth to moderation. If a treatment plan looks excessive, like they were just running up the bill, it probably is excessive. That creates headaches for attorneys and for us. It affects the credibility of everybody in the industry.”

## Financial intermediaries

While doctors in medical groups must wait for a case to settle before they are paid, other medical liens are provided not by medical groups but by financial intermediaries or “middlemen.” The president of a national medical-lien service company spoke on the condition of anonymity to explain how the system works. He requested the anonymity because “the defense lawyers would like nothing better than to have my comments in a plaintiff’s magazine to use against me at a deposition.

“We work on big cases, with big surgical and facility (hospital and rehab) bills. Typical would be \$50K to \$200K. The patient typically does not have insurance or has an HMO insurance plan that won’t authorize back surgery, knee replacement or some other major-cost procedure.”

The middleman explained that the treatment immediately following an injury is often provided at the ER, with follow-up by a medical doctor or chiropractor. “They take some x-rays, maybe do an MRI, spinal manipulation, pain

meds and possibly an epidural treatment. But once it’s clear that surgery is needed, those doctors usually bow out.”

The financial intermediary is brought in by either the PI attorney or by a surgeon who wants to perform the procedure but won’t take the financial risk and needs a surgical facility. “We become the guarantor. We make arrangements for the doctors, surgical center, rehab, whatever is needed. Then we buy the liens from those medical providers. We pay them immediately at a discounted rate and we hold the lien until the case is settled.”

And how much of a discount does the intermediary get from the provider’s bill?

“That’s all over the board, really. Sometimes as little as 20 percent, sometimes as much as 80 percent. It comes down to risk.” While our middleman acknowledged that the discount could put off jurors if a case goes to trial, he suggested that “the doctor being paid upfront by us can actually make the doctor less vulnerable under cross-examination. He’s been paid. He has no financial interest in the outcome of the case.”

Finally, what does the financial intermediary look for before becoming the guarantor?

“Clear liability, an insurance policy with high enough limits to cover everything, and a lawyer we can trust to settle the case and make good on the liens.”

## Convenience for PI clients

Doctors on Liens, which has been operating for about two decades, also has a prescreening process for each of its medical-care providers and maintains strict standards for membership in its network, Parker says. “Because our service has always prided itself on quality over quantity, we hand-select just one doctor per geographical area,” she says. “This not only takes the guesswork out of the selection process, but it also assures the attorney that they are choosing the best doctor every time.

So, for plaintiffs’ attorneys and their clients, these referral services essentially



have done all the legwork – helping connect injured persons with quality medical-care providers in a particular field willing to work on a lien basis. “In order to use our service, the attorney simply picks up our map or goes to our web site and chooses the doctor in any given location (usually nearest to their client’s residence),” Parker adds. “They can then call that office directly with all the assurances that the Doctors on Liens name provides.

“Before referral services like ours, injured plaintiffs often had to choose between a doctor they chose blindly in their own area or a doctor their attorney recommended in his area,” Parker adds. “Now the attorney can recommend, with full confidence, a doctor in whatever area the patient lives who is trained in whatever specialties the patient needs and is experienced in working on liens and writing proper medical/legal evaluations in a timely manner.”

Part of the Doctors on Liens marketing strategy, Parker says, is to be able to say, “This is our Gardena doctor” or “This is our Culver City doctor.” And she insists, emphatically, that her firm is not a listing service. “We are marketers, and we take great pride in each and every one of the doctors we represent,” she says. “When I say they’re ‘part of the Doctors on Liens family,’ it’s not just hyperbole. I’ve had doctors with my service for over 20 years now. I’ve seen their practices grow, and I know how important each and every one of those referrals are to them.”

### **“You can’t hide lien-based treatment”**

For the attorneys’ part, many might choose to advise their clients to seek lien-based treatment only under certain circumstances – mainly when the client has no health insurance or other means to pay for medical treatment.

Greg Rizio, a plaintiffs’ attorney based in Southern California’s Inland Empire, initially advises his clients to use their health insurance, always keeping in mind the possibility of facing a jury in trial.

“You can’t hide lien-based treatment in trial, and jurors tend to distrust an attorney-referred doctor,” says Rizio of Rizio & Nelson in Santa Ana. “So in my opinion, you need to have a valid reason to send them there. If my client doesn’t have health insurance and doesn’t have an option, then jurors will be inclined to say, ‘OK the client didn’t have a choice.’ If the client is going to their HMO doctor, and he won’t send them to an orthopedic surgeon or a specialist, then the jury is more likely to think my client wanted a second opinion, and they’re more likely to accept that than an (initial) attorney-derived doctor visit.”

However, a recent change in California law – the state Supreme Court ruling in *Howell vs. Hamilton Meats* (August 2011) that changed how plaintiffs can claim medical damages – has somewhat tipped the scale in favor of lien-based medical care, even for clients with health insurance.

There is a “theoretic strategic benefit” to doing lien-based cases after the Howell ruling, according to Miles Cooper, a San Francisco-based plaintiff’s attorney.

“If I have a client who’s on Medicare, and they have a \$100,000 medical bill, Medicare pays \$10,000. The only thing admissible at trial is that \$10,000,” Cooper explains. “If I have a client who goes out and gets treated on a lien and is obligated to pay \$100,000, then that’s what they have to pay at the end of the case: \$100,000. And I can introduce the entire \$100,000 as a bill at the time of trial.”

The downside, Cooper says, is the jury hears the doctor has an interest in the outcome and sometimes hears that the doctor has not been paid yet, so that can color the view of the doctor’s testimony, especially when the doctor is talking about causation.

### **A necessity, not a choice**

At times, lien-based care is a necessity rather than a choice, even when the client is covered by health insurance, according to Thomas Stolpman, a plaintiffs’ trial

attorney based in Long Beach. When clients have an HMO plan, they more likely have a doctor that “doesn’t want to play the game” – to give depositions, go to trial, give testimony – and they’re reluctant or unable to write good medical examination reports, Stolpman says.

“So the way this works in the bigger view is the plaintiff lawyer’s job is to get information to the decision-maker. Whether it’s an insurance company, a self-insured entity or whoever, someone has to make a decision to pay money,” he says. “In order for them to get that authority, they have to have documentation. If you have a physician who writes good narrative reports and who is able to provide the data that justifies the bills and gives you medical causation, that’s a good thing.

“That’s one advantage of using lien doctors: They are engaging themselves in the litigation process,” adds Stolpman, a partner with Stolpman Krissman Elber & Silver and a former president of the Consumer Attorneys Association of Los Angeles. “In other words ... they’re more forensically minded than your typical physicians.”

One of the drawbacks from Stolpman’s perspective is many times the doctors who are willing to be involved in the litigation process become known as being very plaintiff-oriented, and they aren’t given a lot of credibility by the defense.

“It’s much like when the defense requests its own medical examination. I don’t even have to read the report; I know what it’s going to say,” Stolpman says. “So credibility, when you’re dealing with substantial cases, becomes a key thing.”

Rizio agrees. He tries to educate his clients, telling them that at the end of four months, they should be asking the doctor how much longer the treatment is going to last. Because again in trial, the defense counsel will come in with its doctor, who will undoubtedly say anything beyond four months isn’t reasonable or medically necessary. “So, I tell my clients, ‘Hey, if you’re at four months and they’re still treating you, you need to ask the



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doctor why.' Because there are some doctors who will treat as long as the clients say, thinking the higher the bill the better. I don't buy that."

Neither will the defense.

### From the attorney's pocket

There are cases where lien doctors are a financial necessity, Stolpman says. But most of the time, he'd rather pay for it as a cost against the case because then he keeps better control over it if it's headed for trial. "And I'm always working a case as if it's going to trial," he says. "The end game is the chess game, not the next move. That next move has to fit into the whole strategy."

According to the attorneys we spoke to, the lien process best fits in smaller cases that almost always are settled. That may be why many medical liens originate with lawyers not particularly prepared to go to trial. In cases where it appears the defendants are going to stand their ground and take their chances at trial, the cases usually are referred to more experienced trial lawyers and the liens, of course, go with them.

Indeed, Rizio says about 75 percent of his cases do not deal with medical liens, but he does take cases from other lawyers in which the clients – some of whom have health insurance – already have been treated on a lien basis.

Cooper, of San Francisco-based Rouda Feder Tietjen McGuinn, has tried cases under similar circumstances. Like Rizio and Stolpman, he makes a practice of initially advising his clients to seek treatment from their own doctor through their own health plan. And when he accepts cases on referral with clients who have already begun lien-based medical

treatment, he is wary of putting a doctor with that type of "exposure" on the stand.

"There are pros and cons," Cooper says of lien-based medical treatment. "The pro is the client can get the medical care he or she needs; the con is you have a doctor who has an interest in the outcome, and that can sometimes be used against that doctor in trial at the time of testimony."

Javaheri, the Power Liens CEO, is a personal injury attorney himself and, in most cases, prefers that his clients seek lien-based medical care because it essentially reduces any immediate financial anguish.

"I have clients tell me, 'I don't want to use my health insurance – I have a deductible, and I don't want to use it.' There are a lot of reasons in today's climate that patients are afraid of their rates going up or getting canceled," Javaheri says. "Most of my clients prefer (lien-based care). They ask, 'I don't have to pay anything out of pocket?' No. 'I don't have to use my own insurance?' No. The benefit to the patient is more, and they prefer it not coming out of pocket and not using their insurance."

### Using the financial intermediaries

When an attorney decides to go the lien route, whatever the reason, working with a financial intermediary – a firm that covers the doctor's fees up front and holds the lien – can alleviate the perception of doctor bias when in trial.

Cooper, the San Francisco attorney, says there is an upside to having these types of financial middlemen involved: It reduces the exposure for the doctor when it comes time for him to testify. "So, yes,

there is a benefit in a situation where the doctor has already been paid by that intermediary service," he says. "Then you don't have a doctor up on the stand and the defense saying, 'You don't get paid unless you win.'"

Javaheri concurs to some extent. "That's a blade that cuts both ways," he says. "It allows the doctor to seem unbiased, yes, but it also means that company that purchased the lien will negotiate a lot harder with the attorney to get two-thirds or their whole bill from the attorney. That's not how liens work."

While Doctors on Liens has no financial stake in the lien, Parker says that due to the complexity and prolonged life of many of these cases, her firm can act as an intermediary in other ways when necessary.

"If the attorney or doctor has a problem getting in touch with each other, if reports aren't delivered properly or on time or if there is any discrepancy over payment, we are always there and always available to act as an intermediary for either the doctor or the attorney," she says.

"Lien work is tough. Lien work is risky. Lien work can take as long as 18 months to be resolved, and sometimes it may not be resolved at all. So long as the doctor is aware of those risks, there are great benefits to be had by both parties."



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