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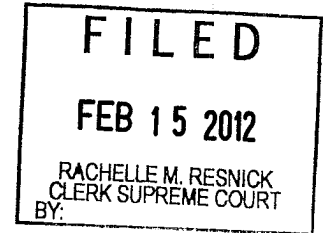
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February 14, 2012

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CLERK SUPREME COURT

Clerk of Court
Arizona Supreme Court
1501 West Washington Street, Room 402
Phoenix, Arizona, 85007



Re: R-11-0024 Ethical Rule 1.15 (“Safeguarding Property”) of Rule 42,
Arizona Rules of the Supreme Court

Ladies and Gentlemen,

I am writing in support of the Petition of Geoffrey M. Trachtenberg and David L. Abney, R-11-0024, to amend the comment to E.R. 1.15.

The Petition and Comments to the Petition describe well the terrible dilemma lawyers and personal injury claimants face as a result of “liens” claimed in a myriad of circumstances. These issues are very complex, such that the Arizona Trial Lawyers Association devotes a day-long seminar, every year, to updating current law and practices concerning liens, with this seminar drawing the highest attendance by far of any of the AzTLA seminars.

So that the Court has the full picture: personal injury claimants are entitled to fair compensation for all the harm they suffer due to the negligence of another. *University of Arizona v. Superior Court*, 136 Ariz. 579, 585, 667 P.2d 1294, 1300 (1983). Fair compensation includes past medical expenses. *Saide v. Stanton*, 13 Ariz. 76, 78, 659 P.2d 35, 37 (1983), Revised Arizona Jury Instructions (Civil) Negligence, Personal Injury Damages 1 “Measure of Damages.”

The claimant’s medical expenses may have been paid by a third entity, most frequently under employer health insurance (sometimes “ERISA” plans), but also sometimes by individual health insurance, AHCCCS, Medicare, Medicare Advantage (a substitute for regular Medicare), Federal Employees Health Benefit Association (FEHBA) (government employees) health benefits, workers

compensation carriers or others. If the claimant recovers, through verdict or settlement, the third parties MAY have a right to be paid back all or some of their expenses in paying for the claimant's medical or other needs.

In addition, some healthcare providers claim a right to "balance bill" against personal injury recoveries. A.R.S. §33-931, *et seq.* In other words, providers claim a right to recover money for their services above and beyond the amount they agreed to accept under contracts with health insurers, AHCCCS, Medicare, etc.

Originally, such claims were invalid as impermissible assignments of personal injury claims. This is because of common law policy that "to require an injured policy holder to return to his insurer the benefits for which he has paid premiums is to deny him the benefits of his thrift and foresight." *Allstate Ins. Co. v. Druke*, 118 Ariz. 301, 304, 576 P.2d 489, 492 (1978). However, this Arizona anti-subrogation case law has been eroded over the years by both state and federal statutes, including but not limited to AHCCCS (A.R.S. §36-2915), Medicare (42 USC §1395 *et seq.*), workers compensation cases (A.R.S. §23-1023), the federal ERISA statute, and the doctrine of federal preemption. ERISA liens are perhaps the most complex of all liens, with the law in a near constant state of flux as new court decisions are handed down, requiring thorough knowledge of the current ERISA case law and a lengthy and time consuming review of ERISA Plan documents to determine whether the claimed ERISA lien is legally valid.

With every lien, there is a gauntlet of questions that must be resolved by the claimant's attorney in order to adequately protect the client's rights, i.e. make sure the client does not repay invalid or excessive liens. These questions include: (1) is it a legally valid lien? (2) Are the amounts claimed related to the injury at issue? (3) Will the lien be reduced so that the lienholder pays its fair share of the fees and costs necessary to generate the fund, i.e. the "procurement costs" in the common fund doctrine? *See e.g. Labambard v. Samaritan Health Service*, 195 Ariz. 543, 991 P.2d 246 (App. 1998). (4) If the claimant receives less than the claim's full value, due to inadequate insurance, comparative fault of others or other reasons, is the lien proportionately reduced?

The unfortunate reality is that a majority of "liens" are sold by health insurers and governments to collection companies, which perform little or no analysis to determine if the lien is legally valid, and which will all too often, especially in ERISA lien cases, continue to claim liens even though the plaintiff's attorney has painstakingly educated them why their lien claim is not legally valid.

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Lawyers must try to resolve the questions above with people who are essentially bill collectors, clerks who have no knowledge, or interest, in questions about validity. They simply keep sending the same demand for payment, over and over again, without acknowledgement of any questions raised.

The most abusive situations seem to occur with “ERISA liens.” Many years ago, in an attempt to lower health care costs for employers, Congress allowed employers to “self-fund” health benefits for their employees and a vast set of regulations arose for those “self-funded” plans. However, health insurers have used the ERISA statutes to argue that in any group health plan (not just self-funded plans), state insurance regulations, including assignment prohibitions like *Allstate v. Druke*, were preempted and ALL health plans had a right to a lien. The result is that claimants’ lawyers must request complicated tax returns, insurance contracts and other documents to confirm that THIS plan is indeed a self-funded plan. Then, all the other questions about reduction of the lien remain. Moreover, we are now finding that many of the ERISA plans do not have a proper Plan Document lien/subrogation provision, such that the lien claims are invalid under a very recent U.S. Supreme Court decision.

All these questions must be addressed to Pension Plan Administrators, yet collection attempts come from outside companies who are essentially bill collectors. Despite federal regulations that require them to provide beneficiaries with evidence of the applicable plan, these entities routinely ignore such requests, sometimes for years.

Your undersigned most recently dealt with a lien claimed by MUZAK against their employee who collected in a medical malpractice case. For two years, in multiple letters, I asked for proof of the validity of the lien. I never got it and it was clear that neither the vendor nor the Plan Administrator was going to respond. This was despite a threat for \$64,000 in fines that were due to my client under federal regulations requiring disclosure of the plans. The vendor simply responded repeatedly with the same form letter demanding full payment, for charges that included services unrelated to the medical malpractice claim.

I do not believe that after two years of research, letters and being ignored (which followed nearly two years of prosecuting a medical malpractice case) that E.R. 1.15 required that I expend significantly more of my client’s money to file a lawsuit, probably in federal court, as either a declaratory judgment or interpleader case. However, some have interpreted the comment to E.R. 1.15 to require that onerous step.

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Entities claiming “liens” carry the burden of proving the validity and accuracy of their debt in any “action” to enforce that debt. That action would also be subject to a statute of limitations, preventing exactly the kind of dilatory tactics we routinely see by alleged lienholders. The burden (including the costs) of initiating such an action legally rests upon the party claiming the debt. If that entity fails to initiate such an action after the claimant denies the debt, then the claimant should assume there is either no valid claim or that the entity chooses not to assert the claim.

Petition R-11-0024 clears up any confusion about these basic legal principles. The Petition should be granted.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'JoJene Mills', written over the printed name.

JoJene Mills

JEM/egb