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A MEDIATOR'S GUIDE TO NEGOTIATING CLAIMS

By: Cynthia Morgan
Mediator, Arbitrator

A challenging aspect to any case can be the liens the mediator and lawyers must contend with before settlement can be achieved. Not only can the amounts affect the bottom line, and therefore the likelihood of settlement, but the lien must be dealt with according to the specific laws governing it. While there are many types of liens the injury practitioner will face, there are four main types of liens that we generally see in mediation¹: (1) Personal Injury Protection or PIP lien; (2) Private medical coverage, i.e. Regence or provider liens; (3) DSHS or Medicare; and (4) Labor and Industries. While the first is most common with your average auto collision case, being prepared to deal with the other three can save headaches in the last hour of your mediation. Deciding whether to have a representative present or available at the mediation is case specific and also depends on the statutory requirements for reimbursement and reduction of liens.

It is well established in Washington that insureds are not entitled to double recovery, and thus after an insured is "fully compensated for his loss," an insurer may seek an offset, subrogation, or reimbursement for benefits already paid. *Thiringer v. Am. Motors Ins.*, [91 Wn.2d 215](#), 219, 588 P.2d 191 (1978); see also *Hamm v. State Farm Ins. Co.*, [151 Wn.2d 303](#), 309, 88 P.3d 395 (2004); *Safeco Ins. Co. v. Woodley*,

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[150 Wn.2d 765](#), 770, 82 P.3d 660 (2004); *Winters v. State Farm Ins. Co.*, [144 Wn.2d 869](#), 876, 31 P.3d 1164 (2001) ("the insured must be fully compensated before the insurer may recoup benefits paid"); *Mahler v. Szucs*, [135 Wn.2d 398](#), 407, 957 P.2d 632 (1998).

(1) PIP LIEN OR RIGHT TO REIMBURSEMENT

The PIP lien is contractual and thus the policy must be considered first. Most insurance adjusters are quite familiar with litigation and mediation and thus negotiating this lien is typically straightforward. The right of reimbursement may be enforced as a lien against any recovery the insured secures against a third party; alternatively, the insurer, standing in the shoes of the insured, may pursue an action against the third party. *Mahler*, 135 Wn.2d at 413. See also *Meas v. State Farm*. 130 Wn. App. 527 (Property damage reimbursement can be exercised before the issue of injury resolved, is not dependent on the insured being made whole, and insured is not entitled to insurer paying pro rata share of his attorney fees).

(2) PROVIDER LIENS & PRIVATE MEDICAL INSURANCE PROVIDERS

While not truly a subrogated interest, it is important to know the full extent of provider liens the plaintiff is

¹ ERISA benefits must also be recognized, but a detailed discussion is far too lengthy for this article.



Mediator Focus: Pat Duffy

By: Natalie Snyder, WAMS Staff

The path to becoming a professional mediator is somewhat unique for each member of the WAMS mediation panel. In the case of Pat Duffy, the opportunity to become a mediator came from WAMS in 2001, in the form of a request that he consider being trained to join the panel. Pat practiced plaintiff's personal injury law in Tacoma from 1975-1992, then moved his practice to Sumner in 1992. He utilized mediation in his own law practice before ever becoming a mediator.

"Pat Duffy had been a WAMS client for many years, so the staff and mediators at WAMS had numerous opportunities to see first-hand what an exemplary lawyer and person he is. He always treated his clients, colleagues and support staff with the utmost respect and courtesy, so we hoped he would become a WAMS mediator as soon as possible," according to WAMS President and House Counsel, Diane McGaha. "He's just the kind of person you enjoy being around," she says.

"Bringing people together" is what mediation is all about for Pat Duffy. As Pat says, "I like people, I like stories, and I've heard many good ones over the years. I guess that is part of my Irish heritage." Pat got much of his professional inspiration from his father, a family doctor who practiced medicine for many years in Pierce County. Pat says his father encouraged him as a young man in ways that made him want to be a person who makes a difference. "I like to learn a little bit about the plaintiff and often ask about their background, family, education and

work. This helps to put the person at ease, since walking into a formal office setting and meeting new people can be an intimidating experience for some."

The challenges of the adversarial process and the different approaches taken by plaintiff and defense counsel are what keep Pat enjoying his mediation work. "I try to understand the issues and hopefully identify areas of agreement in order to resolve the dispute." Pat's favorite aspect of the mediation process is that "the result of a mediation is more predictable than a jury verdict." As a mediation client himself, he also understands that "there are benefits to the clients and attorneys – one of which is minimizing the expense" of litigation.

During his off time, Pat enjoys traveling with his wife (Karen) to a warm spot to play golf. Pat and Karen have three adult daughters, Deirdre, Clare and Tory, who still live in the Puget Sound area. As an active member of the Sumner Rotary Club, Pat also enjoys being involved locally and internationally in support of schools and food programs.

Pat Duffy serves as a WAMS mediator and arbitrator with expertise in the areas of serious personal injury, employment, auto accidents and UM/UIM arbitrations.

"I like people, I like stories, and I've heard many good ones over the years. I guess that is part of my Irish heritage." – Pat Duffy



...WAMS Buzzz

WAMS House Counsel, Diane McGaha, recently attended an ADR conference in Perth, Australia, where she participated in a round-table discussion of marketing for new mediators. ADR in Australia is still a relatively new concept in some ways, but in the area of mediator certification, Australia is at the forefront of the industry. Legislation is pending that would establish national certification standards for mediators to ensure a minimum level of competency for anyone practicing as a mediator. Two of the most interesting growth areas for mediation in Australia

involve disputes about aboriginal rights and business transition planning for family-owned wineries.

In other news, we are pleased to announce the addition of Melody Malloy to our Seattle staff. Melody joined us in March 2008 as a hearings assistant. She gave birth to a baby girl, Saige Christine (8 lbs. 9 oz.), on May 11, 2008.

Tamara Roberts, case administrator, gave birth to a healthy baby boy, Aaron Lee (6 lbs. 15 oz.) on November 21, 2007. Congratulations!

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facing. These can also affect the possibility of settlement. RCW 60.44.010 provides for medical care liens on personal injury suits, but requires they be perfected by filing a notice of the claim with the county auditor. Also keep in mind that total medical liens cannot exceed 25% of the total verdict or settlement.

Private medical insurers are also subject to a *Mahler* reduction or a pro rata sharing of fees and costs. *Winters v. State Farm Mut. Auto. Ins. Co.*, [144 Wn.2d 869](#), 876, 31 P.3d 1164 (2001).

(3) DSHS & MEDICARE

In auto cases, DSHS has a statutory lien pursuant to RCW 74.09.180 and RCW 43.20B.060. (No lien on wrongful death cases where there are surviving dependants) 43.20B provides for the lien, but also dictates that DSHS shall bear a proportionate share of attorney's fees and costs. The mediator and attorney should be aware that DSHS only pays a contractual rate or portion of medical bills. Should the providers attempt to collect the balance, WAC 388-87-007(3) should be reviewed. This section states that a provider's acceptance of DSHS benefits is payment in full.

A Medicare lien is allowed by 42 USC 1395(b)(2) and 42 CFR 411.50. This lien is also reduced for reasonable attorney fees and costs. In addition, 42 USC 2652 (b) allows the United States to waive all or a portion of the claim if it is determined the collection will result in undue hardship upon the person who suffered the injury or disease. The lien may also be reduced if it can be shown that the treatment received was required regardless of the accident.

(4) L & I

A Department of Labor & Industries lien attaches to any recovery by an injured worker against a third party if the Department has paid worker's compensation benefits. RCW 51.24.060(3) further provides that the Department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

- (a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person,
- (b) Factual and legal issues of liability as

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Kathleen Wareham

between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

Courts have universally upheld the department's right to consider other relevant factors when deciding whether to compromise its lien. *Hadley v. DLI*, 116 Wn.2d 897(1991).

Any settlement of a third party action by an injured worker which results in the worker receiving less than the statutory entitlement is void unless made with the written approval of the department or self-insurer. *Boettcher*, 35 Wn. App. 178, 665 P.2d 1378 (1983). See also *Kinsman*, 44 Wn. App. 174, 721 P.2d 981 (1986). Further, Department of Labor and Industries' right of reimbursement for industrial insurance benefits paid be reduced in proportion to the employer's or co-employee's share of fault. *Clark v. PacifiCorp*. 118 Wn.2d 167 (1991). Third party actions also include underinsured motorist claims.

In situations where the decision to reduce or waive is purely discretionary, it is very important that the assigned claims adjuster is apprised of any liability or damage issues prior to the session. If possible, it is most helpful to have the adjuster present at the mediation. It can be helpful to have the adjuster speak with the attorneys face to face to hash out issues in a case and to see evidence, documents, witnesses, etc. that can affect the value of the case and lead to a compromised settlement of the lien. As a mediator who has seen cases fail to settle due to a lien holder's unwillingness to compromise, I firmly believe face to face discussions about the case strengths, weaknesses and chances at trial are far more effective.

"Thank you for everything you did to help my family reach an agreement yesterday. Once my husband and kids learned of the agreement they jumped for joy. This estate turmoil has affected them in a very bad way. I look forward to rebuilding my life with them. I think you are very kind and talented. Thanks again for your hard work."

- WAMS client

Margo Keller

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