

**RECENT DECISION ON PRIORITY OF ATTORNEY FEE
LIENS OVER MEDICAL LIENS**

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In Gilman v. Dalby (Aug. 10, 2009) 176 Cal.App.4th 606, the Court of Appeal for the Third District of California held, as a matter of first impression, a lien for attorney fees and costs has priority over a lien for medical costs “regardless of which lien was first in time.”

Plaintiff Kevin Gilman had a business in which he paid, at a discount, the costs of medical care to the provider of an injured person, in exchange for the assignment of the medical lien by the health care provider for the full amount to be collected from a “judgment that might be obtained by the person in a lawsuit against the tortfeasor who caused the injury.” Apparently, medical providers agree to this arrangement so they immediately receive at least partial payment for treatment of a patient who otherwise might not have the resources to pay, the patient agrees to the arrangement so he gets treated in a timely way, and Gilman agrees “in hopes of getting more money via the medical lien than he paid for it.”

The patient then filed a suit, but it did not turn out the way Gilman, the defendants [plaintiff’s attorneys] or the injured plaintiff had hoped. The case was settled for less than the costs of litigation, and defendants waived their right to attorney fees pursuant to their contingency fee agreement “due to the fact that the settlement amount was less than the total of office costs that had been incurred.” Gilman was not paid. He then filed suit against the defendant attorneys to enforce payment of his medical lien and alleged, among other things, conversion and breach of fiduciary duty.

In their answer, defendants asserted “there were other liens superior and prior to [Gilman’s] lien”; and “defendants ‘were legally bound to pay said superior and prior liens, before any payment could be made to [Gilman].” The evidence showed that while Gilman’s lien came first in time, the injured person had agreed to the lien with Gilman while being represented by another attorney; defendants never signed Gilman’s lien and never accepted its terms. Defendants’ demurrer to the breach of fiduciary duty claim was sustained without leave to amend by the trial court, and the trial court also granted defendants’ summary judgment motion on the conversion cause of action. Gilman appealed.

The court of appeal held the fact defendants were “aware” of the lien did not create a fiduciary duty on their part and therefore the trial court correctly sustained defendants’ demurrer without leave to amend as to the breach of fiduciary duty cause of action. As

for the conversion claim, the appellate court held “as a matter of equity and public policy, defendants’ purported attorney lien for costs had priority over Gilman’s medical lien, regardless of which came first in time. Because the purported attorney lien for costs exceeded the amount of the settlement, there was nothing left for Gilman to collect via his lien, and thus there was no basis for a claim of conversion.” Unfortunately for defendants, however, there was no evidence in support of the summary judgment that they had created an attorney lien against the recovery, and thus they failed to prove they “were entitled to deduct their litigation costs from the settlement proceeds.” The court reversed the trial court’s granting of the MSJ and remanded it for further proceedings.

Though the facts of this case are unusual, the holding of the court was clear that as between an attorney fees and costs lien and a medical lien, the attorney lien will take priority: “Despite the similarity of equities favoring the priority of medical liens and attorney liens, we conclude that, as a matter of public policy, a medical lien against the recovery in a personal injury lawsuit is not equal in equity to an attorney lien for fees and costs created by a retainer agreement to litigate the lawsuit.” And further, the court held, as a matter of law that “the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney lien for fees and costs before it is used to satisfy medical liens.”

Part of the court’s reasoning for this conclusion was that a patient’s chances of success in court are greatly diminished if he or she is not represented by counsel; the medical provider’s chances of recovery are similarly diminished if the patient lacks legal representation to give him or her the best chances of prevailing at trial.