

### **III. SETTLEMENT ISSUES**

#### **A. Settlement Authority**

By now, you are familiar with the claim. Before you can begin settlement negotiations, however, you must set accurate reserves and obtain settlement authority from your manager.

##### **1. Setting Reserves**

An adjuster needs to set reserves (your prediction of what the company will eventually have to pay on the claim) so the company can efficiently allocate its resources. Insurance companies encourage adjusters to accurately set reserves for a number of reasons.

###### **a) The Importance of Reserves**

In any given case, you must accurately set reserves or you will not have sufficient funds with which to settle the case without undue delay. You will be rewarded for accurately setting reserves in all of your cases as a whole, because such accuracy allows the company to make more money and enhances company performance.

If reserves on cases are set too high, the company loses money. Every dollar reserved on a claim but not eventually paid out on that claim, is a dollar that could have otherwise been invested by the company. At times, insurance companies actually make more from their income producing investments than they do by collecting premiums. On the other hand, if reserves are set too low in a significant amount of cases, the company may run afoul of state or federal regulations or, in some circumstances, be exposed to bad faith claims.

###### **b) Setting Initial Reserves**

In order to set accurate reserves, you need reliable information. Start first with documents and sources that provide objective data about the collision or the claimant's injuries. Accident reports and ambulance run-sheets, for example, provide independent information about the collision and the claimant's initial complaints of injury. Pictures of the vehicles and the scene also yield reliable information.

The sales agent for your company may also have important documents that could be helpful, such as application forms or billing information (if coverage is an issue), and statements or notes from the claimant if the claimant first contacted the agent.

Your review of the available written and objective information will probably make you better prepared than the claimant or their lawyer who may not even have the accident report. Take advantage of your superior knowledge by coaxing additional information from the claimant while the claimant is still talkative and anxious to divulge information, as well as when details are freshest in the claimant's mind. The claimant will not usually have the accident report and, early on, will not have been counseled or coached by an attorney.

Even if the claimant has an attorney, the attorney may know less about the case than you do. If you are lucky, you will be directed to a secretary or paralegal. Not only will this person probably know more about the case than the attorney, they will probably share more of what they know with you. Sometimes, they will even provide you with more information than they should.

Candid information can also be obtained from the friends or family of an insured or claimant, especially while emotions are still running high and attorneys and carriers have not had a chance to filter or sanitize the information being exchanged. The same is true of witness statements. They are most fertile when freshly made. Seemingly unimportant details may lead you to other useful sources of information.

### **c) Updating Reserves**

Once you have set initial reserves and documented the basis for your decision, you will need to monitor the progress of the case and adjust your reserves accordingly.

Good adjusters are like some good neighbors--they seem to check in often but don't stay long. Some adjusters seem sheepish when making the frequent telephone calls necessary to maintain or adjust reserves because they assume attorneys find them burdensome or annoying. Veteran adjusters approach these calls with more enthusiasm, however, because they provide an opportunity to develop rapport with the claimant or attorney and keep the case moving. They also provide the attorney with a built-in tickler system.

Moreover, as the case develops, the parties can use these brief discussions to highlight issues they consider important. Subsequent conversations can further refine each party's position. These calls promote the exchange of essential information and progressively lay the groundwork for the essential settlement negotiations.

### **d) Selected tricks of the trade**

Experienced adjusters develop techniques to gather information quickly and efficiently. Here are few of which I am aware:

#### **(1) Leading Questions To Control Discussion**

This technique (often used by credit agencies) allows you to avoid delays by attorneys who do not know about the case or do not have their file or have not been in contact with their client. First, you ask the attorney (or claimant) a series of leading questions about the status of the claim in which you suggest the answer for them, and then ask them to get back to you if you are mistaken. For example, "my last note says your client went to the ER, followed up with the family doctor and got some physical therapy. They returned to work, and have not needed any more treatment. Is that correct?" Often you can supply the material straight from your log notes. These approach saves you time, allows you to gain control of the case, and tells the other side you are knowledgeable about the claim.

Other variations on this technique allow you to abbreviate the process further. Simply ask if there have been any changes since the last call. To avoid fruitless calls at times when a case is stagnant, suggest a length of time when you will check back in and ask them if that sounds reasonable. For example, "since your client is just waiting to see if she has any flare-ups, how about if I check back with you in 60 days? Does that sound reasonable?" If the claimant or attorney assents, you will save

needless calls. This also works with claimants who do not have legal representation. A claimant who has not protested any of your prior summaries of their condition will have a difficult time explaining new injuries or treatment

### **(2) Get A Commitment Of Assistance**

Sometimes, despite your best efforts, you still do not get the information you need from the claimant or their attorney. In these situations, obtain from that person a commitment to have the information you need by a certain date. When you call back at the prearranged time, even if they do not keep their commitment, they may feel enough guilt or embarrassment that they will provide what you need. If that does not work, you are in a position to send a “reverse bad faith” letter that lists your many fruitless efforts to contact them, and their failures to respond

### **(3) Communicate Your Needs Early**

Let the other side know what you need to do your job. Do it sooner rather than later, so the attorney has sufficient time to obtain the documents or information you need. Attorneys are surprisingly willing to provide information if they are convinced it will help settle the claim; often, they are simply unaware of what you need. Even if they are unable to get the requested information, you have made them aware of a problem in their case. They can now confront their client with the weakness in the case and adjust their client’s expectations accordingly.

For example, if you have set reserves based on an assumption that the claimant will not be able to show her carpal tunnel problems are related to the auto collision caused by your insured, let the attorney know. He can then discuss this with the client and the client’s doctor. If they can produce a letter that satisfies your concerns about this, you can adjust your reserves accordingly. If the attorney can not get such a letter, then the attorney can confront the client and, perhaps, readjust the client’s expectations. This may allow the attorney to get authority from the client to lower the demand.

### **(4) Meet Face-to-Face, If Possible**

Institutionally, adjusters and lawyers talk less than ever before. The days are long gone when the field adjuster would stop by the office weekly to chat for an hour about pending cases. Finding a reason to meet face to face about a claim can pay handsome dividends in meaningful discussion about the claim. Events that allow you to meet with an adjuster include allowing for the examination of a scar or disfiguring injury, examining photographs or other physical evidence, informal settlement conferences or mediations.

## **2. Getting Settlement Authority From Claimants**

Attorneys need to ascertain from their clients their own amount of settlement authority before they make demands to the adjuster. This will be based on the claimant’s expectations. A claimant’s expectations are usually based on the net amount that will end up in their pocket (net amount) after all costs and expenses have been subtracted from the offer or demand (gross amount). Accordingly, the attorney must identify all costs, fees, liens, and expenses that will be subtracted from any gross amount in order to identify a client’s expectations. These may include the expenses of bringing the claim (such as expenses for medical records, DMV records, doctor’s narratives, exhibit preparation), liens (such as from medical providers, Champus, Medicare, Medicaid, Vocational Rehabilitation, Workers Compensation), subrogation claims (such as those from health insurance or HMO’s), attorneys fees, and

unpaid medical expenses. These amounts should be determined and verified in writing before negotiations begin.

The adjuster should approach cases the same way when dealing with a claimant that is not represented.

## **B. Negotiations with Attorneys and Claimants**

### **1. Start Off on the Right Foot.**

Build a good working relationship with the other side by being prepared and polite. As the case proceeds, provide credible and reliable information. This will provide a solid foundation upon which to negotiate the case.

#### **a) Mind your Manners**

Initially, be polite and cordial. Once you have developed some rapport with the other person, you may use your own emotional intelligence to develop a style of communication you believe may be even more effective, but in the beginning a courteous approach will prevent myriad problems. All too often, an off-handed comment made casually or spontaneously can offend the other person and taint subsequent negotiations. You often know very little about the person on the other end of the phone.

Do not confuse being polite with being cold or distant. To the contrary, you should immediately find common ground. Most successful adjusters and attorneys are masters at finding common ground with the claimant or attorney, astutely determining and developing areas of mutual interest such as weather, family, sports or common problems we all face in handling claims.

#### **b) Be prepared**

During your first meetings or telephone calls, be prepared and brief. Outline your position succinctly but favorably. The concept of primacy (that what you hear first will be longer lasting than subsequent information) is a powerful tool. What you reveal or emphasize during initial discussions may be what the other side will remember the most. Take advantage of this by putting your best foot forward, but be careful where you step. Pitfalls include revealing too much or speaking without all the facts. Remember the old saying that you can never un-ring a bell.

### **2. Scratch My Back and I'll Scratch Yours**

Insurance companies and claimants, and their adjusters and attorneys prefer to settle rather than litigate claims. Both sides get a result that is quicker, more certain, and less expensive. Settlements are also easier for everyone involved. For these reasons and others, the vast majority of cases settle. Three major reasons cases do not settle are (1) legitimate differences of opinion about the merits of a claim, (2) failure to effectively communicate and obtain information necessary to settle the case, and (3) taking intractable positions, often for reasons unrelated to the issues at hand. Cases that do not settle for the first reason will still have to be tried. There is a chance, though, that cases that fall into the other two categories can be settled if the parties view the process differently.

#### **a) Interest-Based versus Position-Based Negotiating**

Most successful negotiations are marked by an interest-based rather than position-based style of negotiating. Interest-based negotiators recognize that each side has certain interests that need to be

satisfied before a settlement can take place; they do what they can to provide the other side with the information it needs to meet its interests, as long as it does not jeopardize their own client's interests. By contrast, position-based negotiators determine what position they want to achieve and, if they do not reach their objective by the usual means of give and take, provide the other side with an ultimatum to take it or else. For example, if an attorney sends a demand letter to an adjuster in a case with the statement "we demand \$10,000.00 or we will file suit", he is engaging in position-based negotiations. He has said, you either meet my position, or negotiations are over.

#### **b) Steps That Lead to Interest-Based Negotiations**

First, interest-based negotiators determine the other side's needs and constraints. They then communicate their own. Interest-based negotiators offer specific details about what they need before and during negotiations.

Second, interest-based negotiators discuss, at first in the abstract, documents and information that might fulfill the other side's requirements to move the claim further toward a resolution.

Third, interest-based negotiators determine if they are able to obtain any actual documents or information the other side needs that meets the criteria. Then, they negotiate agreements to try to provide this information in exchange for information they need.

Fourth, parties involved in interest-based negotiations provide the specific items during negotiations, in exchange for movement from their other side (either in their last offer or demand or in providing additional information or other concessions).

Fifth, the parties work together in an attempt to craft solutions to problems or constraints that can not be solved through the above means. Above all, they will not shut the door on negotiations if there is any chance that a settlement can still be reached. They will let the dust settle and come back to the table and try again later.

#### **c) Timing**

Throughout the give and take of negotiations, the adjuster and attorney may need to obtain additional authority to modify their last offer. Most of us realize the importance of timing and have felt the rhythm and flow of a successful negotiation. If you can gather documents or other evidentiary ammunition before you go back to a manager or client for more authority, you can capitalize on the intrinsic momentum in the negotiating process. (Whichever side we are on, we can only advance the other side's position so many times before our client or manager begins to raise a question like: "just whose side are you on?") If we can present the manager or client with compelling documents or evidence that supports the other side's position, we can more easily move the case closer toward settlement and still champion our own cause.

### **3. Offer a Helping Hand**

There are many documents that may help the other side obtain additional authority or be used in interest-based negotiations. They include the following:

#### **a) Recent Reports of Settlements or Verdicts:**

When adjusters arm lawyers with reports of adverse verdicts, it allows the attorneys to re-adjust their client's expectations. If the verdicts are similar to the amount being offered, the client may be reassured that he is being treated at least as well as everyone else. When attorneys provide this information to adjusters, it may help obtain more authority or justify paying a little more, as long as the case is sufficiently similar to the claim at hand.

**b) Letters from adjusters that reveal the basis of the offer.**

The claimant's lawyer often faces large liens and outstanding bills from the claimant's medical providers. These must be paid out of the settlement, even if the adjuster argues that the treatment is not related or excessive. If the adjuster provides the lawyer with a letter iterating the offer and stating that the offer excludes the unrelated or excessive treatment, the lawyer may be able to negotiate compromises in the amount of the liens or bills. The same is true for subrogation claims with a claimant's health insurance carrier or on liens with workers compensation carriers, Medicaid, or Medicare. The money freed up by these negotiations is bottom-line money, that is, there will be a larger net recovery by the claimant, even though the carrier has not offered to pay a larger gross amount.

**c) Medical Record Releases**

Attorneys that provide adjusters with authorizations for the release of medical information (if they are restricted to only allow for the release of documents) can save themselves work and demonstrate a good faith effort to expedite the case. This means more work for the adjuster, but also provides an opportunity to gain control of the claim. Similarly, a joint meeting with the claimant's doctor, attended by the adjuster and the claimant's attorneys may be useful in certain cases.

**d) Documents That Reveal Coverage Limits**

Adjusters can benefit from revealing coverage limits (even though it is not required before suit is filed). For example, where an offer just under the coverage limits is made, if coverage is not revealed, the claimant may feel compelled to file suit to discover the amount of coverage available. If client files suit, and obtains a verdict in excess of coverage, the insured has been exposed to an excess verdict. On the other hand, if the adjuster provides proof of coverage limits and settles the case for less than policy limits, the insured has been protected from exposure to an excess verdict. In addition, the company saves a little money and the claimant gets nearly as much money, sooner and with less effort.

Providing an attorney with coverage information also allows attorneys to be more judicious about when to notify underinsured motorist carriers or other excess carriers. In underinsured motorist coverage cases, attorneys are helped by letters from liability carriers stating that the carrier has no other policies providing coverage (to the insured or the vehicle being operated) to use as evidence that there has been an exhaustion of all available liability coverage.

**e) Independent Medical Reviews**

Either party may be able to get additional authority to settle a case if they obtain a written medical opinion from reliable doctor. When one side is confronted with credible, written opinions from their adversary, they are provided with ammunition that will enable them to get more authority or readjust their client's expectations.

If both sides can agree on a well-respected and qualified doctor to use, an actual independent medical examination may be of mutual benefit. This is particularly true today given the nature of health care delivery systems that can cause delays in treatment and disrupt the continuity of care, making it difficult for either side to get reliable medical opinions or prognoses.

#### **4. Stand By Your Man**

Companies should stand behind their adjusters and discourage claimants from going over their heads, unless the adjuster is incompetent or the claim greatly exceeds the adjuster's authority. They should also allow them the freedom to do their job and encourage them to find innovative and creative ways to get cases settled. Last, they should promote techniques that foster communication among claimants, attorneys and adjusters; the result will be quicker settlements that use fewer company resources.

### **C. Mediation**

#### **1. Mediation has been effective.**

- a) Most cases referred to mediation settle at, or shortly after, mediation.
- b) It saves time and money for both sides by avoiding trials.
- c) Even in cases that must be tried:
  - (1) Both sides are forced to thoroughly review the case earlier.
  - (2) Often they at least agree about what they disagree and save time at trial.
  - (3) Based on the opposition's presentation you will have a better idea of which themes your opponent will likely rely on at trial.

#### **2. The parties are usually satisfied with the outcome, because they**

- a) make the final decision about what happens in their claim,
- b) are included in the decision-making process,
- c) get to tell their story, and
- d) get the claim resolved quickly in a civilized way

#### **3. Some Tips and Recommendations for Mediation.**

- a) Send out a pre-mediation letter. In the letter you can:
  - (1) Request a guarantee from the other side that they will have at the mediation anyone whose presence is essential to settle the claim (i.e., all parties and all persons with authority to settle the claim).

- (2) Request the other side to notify anyone that may have an interest in the claim (i.e., lienholders or subrogees) so there is no question about what will happen with the proceeds from any settlement.
- (3) Ask the other side to have available at the mediation any documents or information essential to a full discussion of the case, such as prior health info, documentation of all special damages, or other specific information that may be important.
- (4) If the other side does not comply, you may be able to successfully move to exempt the case from mediation, if the case is in mandatory mediation.

b) Select a good mediator

- (1) Take advantage of the opportunity to select a mediator. If the mediation is mandatory, do not let the court appoint a mediator for you.
- (2) Select a mediator with experience dealing with auto cases, preferably from both the plaintiff and defendant attorney's perspectives. Ideally, they should have the experience and ability to advise each side about the burden and risks inherent in going to trial.
- (3) Look for a mediator forceful enough to influence the parties, but not so heavy-handed they will alienate anyone.
- (4) The best mediators appear, from the participants' perspective, to be neutral. Some have a knack for actually being neutral but appearing, to both sides, to be biased in their favor.
- (5) Above all, select a mediator that can bring your mediation to a resolution. Find out which mediators have a track record for getting cases settled. These mediators may be in greater demand or cost more per hour, but they are worth the extra effort and money.

c) Provide Information Helpful to Your Case To the Other Side Before the Mediation.

- (1) This allows the adjuster and lawyer to get the authority they need at mediation.
- (2) This allows the other side time to readjust reserves and have the right people look at the case, or lets the same person look at the case in a new light.

d) Demonstrate Your Readiness for Trial, Organization, and Conviction.

- (1) Let the other side know you are ready for trial.
- (2) Be organized.
- (3) Lead with your strengths.
- (4) Decide whether and to what extent to keep some powder dry.

**4. Other Benefits of Mediation**

- a) You get the chance to meet the claimant and her attorney, which lets you assess their likely credibility and effectiveness.
- b) You will see a forecast of the other side's jury presentation, which lets you test out the efficacy of their arguments, as well as your own.
- c) Mediation may move you further toward resolution by allowing the parties to isolate the impediments to settlement and identify the other side's truly important issues.

**D. Consent to Settle and Subrogation**

**1. Definition of Subrogation:**

The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.  
[Citation Omitted]

The right of one who has paid an obligation which another should have paid to be indemnified by the other. Olin Corp. (Plastics Division) v. Workmen's Compensation Appeal Bd., 14 Pa. Comwlth. 603, 324 A.2d 813, 816.

Insurance Companies generally have the right to step into the shoes of the party whom the compensated party could have sued.

Black's Law Dictionary 1279 (Rev. 5<sup>th</sup>. Ed. 1968)

**2. In the context of the Automobile Case**

Historically, it is within the context of underinsured motorist (UIM) coverage that there has been the most interest and disagreement over legal issues concerning consent to settle and subrogation. Prior to 1985, a claimant who wanted to accept the tender of policy limits from a liability

carrier was required to first obtain the consent of the UIM carrier. This was required under the language of the governing statute, N.C. Gen. Stat. § 20-279.21, and under the terms of the policy. Carriers routinely withheld consent to settle in such cases.

In response, the legislature progressively enacted statutory changes setting forth a mechanism to more easily allow liability carriers to tender their coverage and to be relieved of further duties to defend and for claimants to accept the liability carrier's money and still proceed with their claim for a UIM recovery.

Under the current statute, and under the terms of current UIM policies, a claimant may accept the tender of policy limits from the liability carrier, so long as he notifies *in writing* the UIM carrier 30 days before accepting the funds. This procedure allows the liability carrier an opportunity to tender its limits, arguably exhaust its coverage, and end its duty to defend the tortfeasor. It also allows a claimant to collect the liability policy limits and keep alive a claim for additional recovery up to the limit of the UIM policy. The UIM carrier is provided an opportunity to exercise their subrogation rights (if they advance funds equal to the limits of the liability policy within the 30-day notice period). The tortfeasor is protected from being personally exposed to an excess judgment by the claimant, although the tortfeasor is still exposed to the UIM carrier's subrogation claim if the UIM carrier advances and the claimant obtains a verdict in excess of the liability coverage.

The statute also provides for liability carriers to petition the court to be relieved of any further duty to defend so-called, "dump and run motions". These motions are allowed when the court is satisfied that the tortfeasor/underinsured motorist has been apprised of the nature of the proceedings and has been given the right and opportunity to select counsel of her own choosing. The tortfeasor/underinsured motorist will usually not retain separate counsel since his interests and those of the UIM carrier are sufficiently similar, but must be given the opportunity to do so.

If the UIM carrier advances, the carrier is subrogated to the rights of the tortfeasor/underinsured motorist. If the tortfeasor/underinsured motorist has been given adequate notice of the right to retain independent counsel, the outcome in the underlying negligence action brought by the claimant is *res judicata* between the UIM carrier and the owner, operator, or maintainer of the underinsured highway vehicle. The UIM motorist must reimburse the carrier for the amount of the judgment obtained by the injured plaintiff less the amount of liability coverage paid by the liability carrier.

The claimant, under any circumstances, should not execute a general release. Even if the carrier does not advance funds to exercise its subrogation rights or enforce the consent to settlement clause, the claimant may still forfeit their right to pursue a UIM claim by executing a general release. Spivey v. Lowery, 116 N.C. App. 124, 127, 446 S.E.2d 835, 838, *discretionary review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994).

Special care should be made when filing UM and UIM claims. Different rules apply to each. In an UM claim, the insurance company is a named defendant, their name should actually appear in the caption. A summons should be issued in their name and served upon them. Make sure you identify the actual name of the carrier that issued the UM policy and verify it with specificity at the Insurance Commission. Do not just name the holding company that owns a group of carriers. For example, Nationwide Mutual Fire and Casualty Insurance Company, not just Nationwide Insurance. Suit against both the tortfeasor **and** the UM carrier must be filed within the statute of limitations for the tort

involved. Polk v. Andrews, 587 S.E.2d 510 (N.C.App. Nov 04, 2003) (NO. COA02-1455) (holding that two-year wrongful death statute of limitations applied to claim against UM insurer).

In a UIM claim, the carrier is not named in the caption but is an un-named defendant. Even so, it is wise to issue a summons directed to the UIM carrier and serve it upon them within the statute of limitations. In any event, notice to the UIM carrier should be given as soon as possible. See Liberty Mutual Insurance Co. v. Pennington, 141 N.C. App. 495, 541 S.E.2d 503 (2001), *affirmed*, 356 N.C. 571, 573 S.E.2d 118 (2002).

## **E. Lien Considerations**

### **1. Liens:**

A lien is not created by contract, but by law. A state or the federal legislature creates a lien when they pass a law that creates for one party a right to satisfy their demand out of the proceeds of a settlement from a third party. The North Carolina legislature created a lien when they passed G.S. 44-49 and 44-50, which created for medical providers the right to get their bills paid from personal injury settlements funded by motor vehicle insurance proceeds. The following points are significant and often misunderstood:

- a) Every claim for reimbursement is not a lien, only those created by statute and designated as liens.
- b) A lien encumbers the proceeds, and allows a person to retain the proceeds until the lien is satisfied. If the debt is not satisfied out of the proceeds, you or your carrier remain liable to the lienholder for the amount of the debt.

### **2. Applicable Liens under Federal Law**

- a) Champus 10 U.S.C. § 1072
- b) Medicare 42 U.S.C. § 1395y(b)(2)(A)
- c) U.S. Workers Compensation 5 U.S.C. § 8132
- d) Railroad Unemployment Ins. 45 U.S.C. § 362(o)

### **3. Applicable liens Under State Law**

- a) Medicaid N.C. Gen. Stat. § 108A-57
- b) Medical Providers N.C. Gen. Stat. §§ 44-49, 50
- c) Vocational rehabilitation N.C. Gen. Stat. §§ 143-547
- d) Victims Compensation N.C. Gen. Stat. §§ 15B-18
- e) N.C. Workers Compensation N.C. Gen. Stat. § 97-10.2

### **4. Satisfying Various Liens**

- a) Establish whether the person seeking part of the proceeds really has a lien.

Ask them to provide you with the statutory basis for the lien. Then check the statute and determine if they have followed the required procedures. Court's strictly construe liens because they are in derogation of the common law.

- b) Assume you do not need notice.

Examine the claim for clues that there might be a lien. Some liens and claims require the lien holder to provide written notice, most do not. Notice of most of the federal liens is imputed; you are supposed to know about them. If you do not know about the lien, ignorance is not an excuse. You will still need to pay the government the amount to which they are entitled.

- c) Ensure that the lien holder has met the statutory requirements.

Some liens require certain procedures to be followed, and some liens require virtually nothing. Make sure the lien holder has followed the essential requirements before you hand over the proceeds.

- d) Insurers should have the Plaintiff's attorney to handle all of this.

Liens present risks for both insurers and plaintiff's attorneys alike. Insurers, whenever possible, should attempt to shift this risk to the Plaintiff's attorneys, by negotiating an agreement that the Plaintiff's will handle these matters. Such an agreement should be confirmed in a transmittal letter and later put into the release. This protects the insured and the carrier. Insurers who do not resolve all potential liens do so at their peril. A recent case involving a *pro se* plaintiff seems to suggest that an insurer might be liable to pay a medical provider's lien, even if the carrier disputes the reasonableness of the treatment, as long as the medical provider gives the insurer actual notice of the lien. See Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46 (2003), *review on additional issues denied*, 357 N.C. 507, 587 S.E.2d 674 (2003) (holding that insurer's actual notice of medical expenses incurred by pro se injured party may create lien against future proceeds).

Of course, liens create particular risks for plaintiffs attorneys. Lien holders that are not paid from the proceeds will look first to the plaintiff's attorney for payment, even if settlement proceeds have been disbursed. See Triangle Park Chiropractic v. Battaglia, 532 S.E.2d 833 (2000). Plaintiff attorneys face additional pressure from clients who, at the time of settlement, may have second thoughts about paying lien holders and attempt to influence how the proceeds are distributed. The legislature may have been trying to insulate attorneys from such clients by adding language to §44-50 in the 2001 session laws. One of the changes made states that: "Except as provided in G.S. 44-51, a client's instructions for the disbursement of settlement or judgments proceeds are not binding on the disbursing attorney to the extent that the instructions conflict with the requirements of this Article." Two interesting cases involving G.S. 44-49 and 44-50 and the distribution of settlement funds have a common plaintiff and a common theme. In both cases, the clients attempted to influence how or whether a lien holder gets paid and, in both cases, the Court held that the attorney is protected if he or she follows the statute. See North Carolina Baptist Hospitals, Inc. v. Mitchell, 88 N.C. App. 263, 362 S.E.2d 841 (1987), *affirmed*, 323 N.C. 528, 374 S.E.2d 844 (1988) (holding that disbursement per the statute was proper even though the hospital, which had been given an assignment of proceeds, was denied its full recovery), and North Carolina Baptist Hospitals, Inc. v. Crowson, 155 N.C. App. 746, 573

S.E.2d 922 (2003), *affirmed*, 357 N.C. 499, 586 S.E.2d 90 (2003) (holding that the statute does not require distribution of proceeds pro rata to all lien holders, even if some get nothing).

Attorneys must also consider all other encumbrances on settlement proceeds, whether or not they are true liens, before distributing settlement funds. Attorneys seem to be facing an ever-increasing array of parasitic legal obligations attempting to attach themselves to settlement proceeds. These include but are not limited to statutory obligations, contractual claims for subrogation, and assignments of proceeds. One of the most lecherous is the self-funded ERISA plan. When and to what extent such subrogation claims need to be satisfied is an unsettled and very complicated area of law. It is becoming increasingly clear that such claims can not be ignored and must be dealt with whenever they might present themselves. It is always wise to anticipate their existence and deal with them before a settlement is negotiated. It is unclear to what extent state laws and administrative provisions will prevent subrogation claims by ERISA plans and other entities. See Singh v. Prudential Health Care Plan Inc. (Lawyers Weekly No. 03-01-0883, 21 pp.) (2003). (Fourth Circuit Court of Appeals Case holding that ERISA plan's subrogation provision pre-empts Maryland law prohibiting such subrogation). The smart practitioner will, among other things, want to ensure the plan is a valid, self-funded plan, brush up on the current law, and strike the best deal with the persons who are asserting the subrogation claim. This should be done before a settlement of the case is reached. Of course, there are circumstances in which self-funded ERISA plans may not be entitled to subrogate, but the details of that are far beyond the scope of this paper.

Non-ERISA plans subject to North Carolina law are generally not able to subrogate, See In re Declaratory Ruling by North Carolina Com'r of Ins. Regarding 11 N.C.A.C. 12.0319, 134 N.C. App. 22, 517 S.E.2d 134 (1999), but there are exceptions to this rule as well.

Assignment of the settlement proceeds from an injury settlement, as opposed to an assignment of the legal claim itself, seems to be permissible. See Charlotte-Mecklenburg Hosp. Authority v. First of Georgia Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995)(involving assignment of proceeds to hospital); Alaimo Family Chiropractic v. Allstate Ins. Co., 155 N.C. App. 194, 574 S.E.2d 496, *review denied*, 356 N.C. 667, 557 S.E.2d 108 (2003)(allowing assignment of future settlement to chiropractor). Such assignments are a potential trap for the unwary. You should find out whether your client has executed assignments of proceeds to any of his medical providers, or to anyone else.

## **5. A Table of Commonly Encountered Liens Appears at the End of the Paper**

You may also encounter other liens that simply need to be paid from the proceeds, particularly in connection with the property damage settlement. These liens present less risk and confusion because you will know about them, either because you dealt directly with the lien holders (e.g., mechanic's liens for repairs or storage of the vehicle) or because they encumber the vehicle's title (banks or finance company loans secured by the vehicle).

### **F. Settlement Documents**

#### **1. Releases**

Adjusters are usually instructed to get a signed release before settling claims, so that their insured is protected from being sued by the claimant. Adjusters are routinely armed with a variety of releases to use depending on the circumstances. Releases commonly used include: Property Damage Only Releases, General Releases, Parent and Guardian Releases, Release and Trust Agreements to use in

Uninsured Motorist cases, and Release and Trust Agreements to use in Underinsured Motorist cases. In some cases, a company may allow for the use of a customized release, or even no release at all. Good judgment and good faith are required in selecting the appropriate release. If the wrong release is used because of incompetence, the insured may be exposed to a potential judgment. If the adjuster uses the wrong release in an attempt to take advantage of a claimant, particularly a first-party claimant, they may be exposing the carrier to a bad faith claim (See Later Topics on Consumer Protection Issues). Releases are contracts and are subject to the same defenses and equitable principles that allow a party to void any contract (See Later topic – Reneging on Settlement). However, this happens rarely and only in extreme situations.

## **2. Covenants Not to Sue**

Covenants not to sue are used when it is the mutual intent of both parties to the settlement to allow the claimant to release certain parties but retain the right to proceed with claims against others not a party to the settlement. Most common to automobile claims are the covenants used in underinsured and underinsured motorist claims. For years, there was little consensus about how to draft a document that simultaneously protected the tortfeasor from personal exposure but still preserved the right of the claimant to pursue UIM coverage. Trial attorneys and appellate courts, as well as the legislature, have generated reams of inconsistent and confusing law about how and when a plaintiff can accept funds tendered by a tortfeasor's liability carrier without jeopardizing the plaintiff's right to pursue a claim to obtain underinsured motorist coverage. Attorneys for carriers and injured persons have wrestled with how and when to execute a document that allows the carrier to "dump and run" but preserves the plaintiff's right to get a piece of the pie now without losing the opportunity to get more later. The sea of uncertainty was calmed by the decision of the Court of Appeals in North Carolina Farm Bureau v. Bost, 126 N.C. App. 42, 483 S.E.2d 452 (1997), disc. rev. denied, 347 N.C. 138, 492 S.E.2d 25 (1997). The legislature also helped to provide a safe harbor to litigants by endorsing the use of such covenants in the statute when it was later amended in 1997. The statute now expressly allows for the use of a "contractual covenant" not to enforce a judgment against the owner, operator, or maintainer of an underinsured vehicle, and ensures that by doing so that an injured party will not be precluded from pursuing UIM coverage. N.C. Gen. Stat. Section 20-279.21(b)(4). The use of such a covenant will also not preclude a UIM carrier from pursuing its right of subrogation, unless the covenant expressly provides otherwise.

Nonetheless, covenants must be scrutinized carefully. They must be drafted narrowly to ensure that only the parties providing consideration are released. For example, accepting the limits of coverage from one liability carrier in exchange for executing a covenant not to execute against the tortfeasor may preclude claims against other liability insurers if their policies are predicated on the insured's obligation to pay damages. Lida Manufacturing Co. v. U.S. Fire Ins. Co., 116 N.C. App. 592 (1994).

## **3. Court Documents and Approval**

If you settle a wrongful death claim with minor beneficiaries, or in the case of a settlement of a minors claim, a court must formally approve the settlement. If you settle a claim in which the claimant has received workers compensation benefits, you will need to get the settlement approved by the North Carolina Industrial Commission before funds can be disbursed. In every case where there has been a lawsuit filed, you will need to confirm that there has been filed with the court a dismissal with prejudice under Rule 41 of the North Carolina Rules of Civil Procedure.

**a) Workers Compensation Cases:**

Under N.C. Gen. Stat. § 97-10.2, the Industrial Commission must approve settlements in all third-party claims. Approval is obtained by submitting a Motion and proposed Order Directing Distribution of Third Party Recovery. Sample Orders can be found in the section of Forms attached to the Workers' Compensation Rules of the North Carolina Industrial Commission. Approval often takes weeks to obtain, but can be expedited under some circumstances. The attorney for the workers compensation carrier usually obtains this approval if the claimant is un-represented; otherwise, the claimant's attorney will usually see to this task.

The claimant and the workers compensation carrier share equally in the payment of litigation costs and attorneys' fees. Questions remain as to whether the health care provider can recover from the claimant (or the third-party carrier) the difference between the amount of the bill reimbursed by the comp carrier and the normal amount charged.

**b) Wrongful Death Claims**

Under N.C. Gen. Stat. § 28A-13-3, a judge of superior court must approve the settlement unless all beneficiaries are competent adults who have consented in writing.

Under N.C. Gen. Stat. § 28A-18.2, all claims against proceeds of a wrongful death settlement shall be approved by the Clerk of Superior Court and any party adversely affected by any decision of the clerk may appeal to the Superior Court.

**c) Minor Settlements**

Court approval is wise when settling any significant case on behalf of a minor. Court approval first requires filing a motion for the appointment of a Guardian Ad Litem (guardian for the litigation). The Guardian Ad Litem then has authority to file a complaint on behalf of the minor. This action can be filed in the District or Superior Court. A simplified procedure for the compromise and settlement of a minor's claim may also be brought pursuant to N.C. Gen. Stat. §§ 1-400 through 1-402. Next, a judge hears the parties' summary of the case and, if the judge finds the settlement in the best interests of the minor, enters an order approving the settlement. Note that any medical providers' liens attach to the parents' claim for medical expenses not to the minor's settlement.

**G. Reneging on settlement**

An agreement to settle a case, whether oral or written, is a contract. As such, settlement agreements are to be tested and interpreted by the established rules relating to contracts. Futrelle v. Duke University, 127 N.C. App. 244, 251, 488 S.E.2d 635, 640 (quoting Casualty Co. v. Teer Co., 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)), *discretionary review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997). A valid contract does not exist if the parties have not reached a meeting of the minds as to all essential terms of the agreement, or if material portions are left open for future agreement. *See, e.g., Chappell v. Roth*, 539 S.E.2d 666 (2000) (holding that defendants, who claimed that settlement agreement was invalid, had to overcome presumption that agreement was valid by demonstrating that contested provision, requiring that plaintiff would pay all liens, was material).

Like any contractual agreement, either party may breach the contract by failing to honor their contractual obligations. The other party can then attempt to enforce the agreement, if it chooses, either by filing a motion in the cause or by independent action for breach of contract. The breaching

party can avoid their obligations under the contract if they successfully show that there was no contract to begin with, that is, there was no meeting of the minds or mutual intent to be bound. The contract will also not be enforceable if the one a party did not have capacity to enter into a contract to start with, as with a minor or incompetent. The breaching party can also contest the terms of the contracts.

Some of these problems can be avoided by entering into a settlement agreement or by memorializing in a letter the essential terms of the settlement, especially if the parties are represented. There is a presumption in favor of an attorney's authority to act for the client he professes to represent, both for procedural and substantive aspects of the case. *See, e.g., Harris v. Ray Johnson Const. Co.*, 534 S.E.2d 653 (2000) (holding that plaintiff's attorney had actual authority to settle claim for \$2,000, and that plaintiff was bound by attorney's acceptance of offer, even though in hindsight it was apparent that plaintiff and her attorney had not reached a clear agreement as to whether that was a net or gross recovery for plaintiff). When drafting settlement agreements special care must be taken to include all material terms. With oral agreements, you should confirm such terms in writing and it is often helpful to request the other side to provide you with immediate written notice if your letter does not accurately reflect the terms of the agreement.

A party may also raise defenses affirmative defenses to escape their contractual obligations. For example, a party may raise defenses based on fairness and equity, such as a claim that an agreement was obtained by deception or fraud or coercion. They may seek the court's help in equity by asking the court to prevent the party with unclean hands from being unjustly enriched, or seek remedies based on public policy considerations or equitable estoppel.

Even if an agreement to settle is supported by a writing, the party seeking to enforce the settlement may still need to file an independent contract claim (lawsuit) to enforce the settlement. Even if they prevail, they may have wasted considerable time and effort only to be right back where they began.

Fortunately, renegeing on an agreement is not common. Moreover, it is disfavored under the law. Breach of a settlement agreement, to the extent it can be construed to be analogous to a judgment, may even give rise to a bad faith claim if it is accompanied by "aggravating conduct" sufficient to justify an award of punitive damages.

If you are concerned about the trustworthiness of the other side, send a letter or get them to sign a settlement agreement. If circumstances allow (such as a minor settlement, death claim with minor beneficiaries, arbitration, mediation, or other judicial proceeding) have the court enter an order reflecting your agreement.

**(Table 1)**  
**A Table of Commonly Encountered Liens**

<b>Type of Lien</b>	<b>Notice Required</b>	<b>To what Lien Attaches</b>	<b>Formula For Disbursement</b>	<b>Who to contact</b>
<b>Champus</b>	Imputed Lien for sums paid or incurred by servicemen or their family for treatment by VA hospital or Private hospital	Lien attaches to source of funds as well as to proceeds of settlement	Subject to adjustment (reduction or waiver); No attorneys fees; no Cap.	Affirmative Claims Recoveries Branch of Federal Medical Case Recovery Section in the Office of the Staff Judge Advocate for (the Serviceman's Branch of Service).
<b>Medicare</b>	Imputed Lien. Ignorance of lien is no defense. Clues include elderly or disabled claimants and mentions of Medicare in records of payment by Medicare	Lien upon proceeds of first (MP, UM, UIM) and third party claims; they have a true right of subrogation; can sue the tort-feasor directly even without a claim by Plaintiff	Statutory formula that allows Deductions for up to one-third attorneys fees and costs; No cap; difficult to get reductions.	Contact Blue Cross Blue Shield who will notify Administrators for Part A (hospital charges) and Part B (doctors bills); Review statements for only related charges
<b>Medicaid</b>	Imputed. Ignorance of lien is no defense. Clues include impoverished or disabled clients and mentions in the record of Medicaid	Lien against source of proceeds and recovery itself, in first or third party claims; can sue the tort-feasor directly even without a claim by Plaintiff	Statutory formula that allows no deductions for attorneys fees; but, Medicaid will never receive more than one-third of the recovery	North Carolina Department of Human Resources, third Party Recovery section
<b>NC Work Comp</b>	It would be rare that an attorney or adjuster would not know of a comp carriers involvement	Lien against source of and proceeds of third party settlement (including maybe UIM but shouldn't because of offset). Carrier may pursue subrogation claim against third-party if worker does not (>12 mo.s)	Statutory formula that allows Deductions for up to one-third attorneys fees and costs	Negotiate with carrier; judicial remedy available for reductions; must be approved by industrial commission

Type of Lien	Notice Required	To what Lien Attaches	Formula For Disbursement	Who to contact
<b>US Work Comp</b>	Imputed. Clues: Claimant must be injured while on the job as a federal employee.	Lien upon proceeds and source of funds in first party claims only.	Statutory formula allows for attorneys fees and costs, and for approximately one-fifth of any of net thereafter to be retained by worker	Regional Office or U. S. Department of Labor  Office of Solicitor  Atlanta Federal Center  61 Forsythe Street, Room 7T10  Atlanta, GA 30303
<b>Medical Providers</b>	Requires that medical records have been provided for free, and , arguably, some notice. A Lien only on proceeds in hands of claimant's attorney or clerk of court. This does not apply to adjusters in cases where claimant does not have an attorney.	Payment under lien statute, or failure to perfect lien, does not absolve claimant of responsibility to pay bill.	No deduction for attorneys fees but liens are capped at one-half of amount available after deduction for attorneys fees	Contact the Providers that contend they have a lien on the proceeds
<b>Voc. Rehab</b>	Lien attaches to source of funds as well as to proceeds of settlement	Lien upon proceeds of first (MP, UM, UIM and WC or Health Ins.) and third party claims; they have a true right of subrogation; can sue tortfeasor directly without claim by tortfeasor	Same formula as Medicaid; Division has the authority to waive lien in cases of hardship	Contact local Vocational Rehabilitation office