

APPENDIX II

Department of Industrial Relations

Issue Brief: Issues and Impact of Lien Filing in California Workers' Compensation System

August 19, 2016

Purpose

The purpose of this issue brief is to outline key issues and options involved in lien filing and cost reductions that could be achieved through improvements to the Labor Code's lien statutes.

Background Summary

California's workers' compensation law allows certain claims for payment of services or benefits provided to or on behalf of injured workers to be filed as a lien against an employer in an employee's claim for workers' compensation benefits.¹ California is unique in this regard—no other state supports lien filing in its workers' compensation system. The filing of a lien generates collateral litigation between the lien filer and the defendant (insurer or employer) over the validity of the claim and the necessity, extent, and value of any services provided. The parties may then settle on an amount due or adjudicate the dispute in a "lien trial" before the Workers' Compensation Appeals Board (WCAB).

The landmark 2012 workers' compensation reform legislation SB 863 included a number of provisions to reduce costs by reducing the volume of lien claims and lien claim litigation in the workers' compensation system, including through the reestablishment of lien filing fees, the creation of an Independent Bill Review system that takes most billing disputes out of the litigation system, and restrictions on the ability of third parties to collect on assigned lien claims. Opponents of these measures, as with much of SB 863, have challenged them in court or argued that they did not really change preexisting ways of doing business. These measures still have not been fully effective in stemming lien filings or the pursuit of fraudulent lien claims, and further reforms may be appropriate.

History

The number of lien filings increased dramatically in the early 2000s, from about 12,000 per month in 2000 to about 40,000 per month in 2003. That year, the legislature established a filing fee of \$100 for liens for medical treatment and medical-legal expenses, expecting that it would curtail routine filings in cases where the right to payment was not in doubt. However, significant administrative resources had to be devoted to processing the fees, and they proved to be less of a deterrent than hoped. The legislature repealed the fee in 2006 and instead adopted new lien filing standards in Labor Code section 4903.6, with the intention of preventing frivolous lien filings.² Nevertheless, after a temporary drop

¹ Two types of claims are denominated as "liens" in the workers' compensation system. First, some liens are for money paid to a worker, such as State Disability Insurance benefits paid by the Employment Development Department (EDD) while the workers' compensation claim is pending, which can be deducted from the monetary benefits that are payable to the worker. Second, some liens are for services that cannot be charged to workers or deducted from their benefits but are charged to and paid directly by the employer or insurer. This brief concerns the second category of liens, which are in addition to the benefits paid directly to workers.

² http://www.dir.ca.gov/dwc/dwc_newsline/2006/Newsline_33-06.pdf.

following the introduction of the Electronic Adjudication Management System (EAMS) online filing system in 2008, lien filings again rose through the end of the decade to as many as 34,000 per month. In 2010, the California Commission on Health and Safety and Workers' Compensation (CHSWC) revisited the issue of why the number of liens was increasing again despite the reforms passed by the legislature in SB 899 (2004). In its 2011 "Liens Report," CHSWC found that "liens are both a cause and a result of serious distress in the California workers' compensation system." The Commission found that in at least one WCAB district office, liens consumed 35% of the court calendar and estimated that employers and insurers were expending \$200 million per year on loss adjustment expenses to handle medical liens. Further, it found that the "volume of liens forces the courts to encourage settlement, almost to the point of coercion. The necessity of settlement rewards both unjustified claims and unjustified refusals."³ CHSWC documented a series of recommendations that were the basis for many of the lien-related adjustments included in the historic SB 863 reforms of 2012.

SB 863 reinstated the lien filing fee and also enacted a new Labor Code section 4903.8 to address the assignment of liens by service providers to others in the business of filing and collecting on liens. Assigned liens were a particular problem in the system and fertile ground for presenting fraudulent claims because they removed the dispute from the persons who actually provided or received the services in question. They are especially prevalent in "denied claims," that is, claims that an insurer has already rejected. In such cases, bills for treatment (real or imaginary) may be run up by a provider with no expectation of direct payment by the insurer, but then bundled and sold to a third party, who files liens in an existing workers' compensation case, sometimes well after the worker's original case has been resolved.

Section 4903.8 requires that any order or award for payment of a lien be made only to the service provider, unless an enforceable and irrevocable assignment was completed prior to January 1, 2013, or the service provider has ceased doing business and has assigned all right, title, and interest in its accounts receivable to the assignee. Subdivision (b) of this section requires a true and correct copy of the assignment to be filed and served with the lien or within 20 days of the assignment. Subdivision (c) authorizes the WCAB to make a bad faith inquiry when there are multiple assignments of the same bill. Subdivision (d) requires the lien to be supported by a declaration under penalty of perjury by at least one natural person who can attest to the fact that the services or products were provided. Subdivision (e) states: "A lien submitted for filing on or after January 1, 2013, . . . that does not comply with the requirements of this section shall be deemed to be invalid, whether or not accepted for filing by the appeals board, and shall not operate to preserve or extend any time limit for filing of the lien."

Although these provisions seem clear, they have proven difficult to enforce. Third-party filers have omitted requisite information and paperwork regarding assignments when filing their liens through the EAMS system, effectively getting a foot inside the courthouse door and leaving it to defendants or the

³ California Commission on Health and Safety and Workers' Compensation, "Liens Report," January 5, 2011, accessed February 12, 2016, at https://www.dir.ca.gov/chswc/Reports/2011/CHSWC_LienReport.pdf.

Division of Workers' Compensation (DWC) to determine whether the filing was invalid because the lien was assigned after January 1, 2013, or because the provider in fact was still in business. Tools are available for others to do this, including by reviewing statements and other reports filed with the Secretary of State that document the transfer and securing of accounts receivable; and DIR has been able to find instances in which this occurred, but no record of assignment was included in the documents filed through EAMS.⁴

Case Study

Reshealth Medical Group in Hermosa Beach, established as a corporation with the Secretary of State's office on August 14, 2013 (7½ months after the effective date of SB 863), ranks twelfth among medical lien filers in calendar years 2013 through 2015, with 4,696 medical liens filed for services totaling \$21,479,325. In the case of *Gituku v. Alta Home Care*, WCAB Case No. ADJ 9178612, Javlin Three LLC filed lien claims as the assignee of Reshealth, alleging that Reshealth had gone out of business as of the summer of 2015. In a Decision After Reconsideration just issued on August 9, 2016, a panel of WCAB commissioners found that it was impossible to determine whether Reshealth (and another provider from whom Javlin had purchased accounts receivable) fell within either of the exceptions in Section 4903.8 or whether the assignments in fact covered the subject bills, because the assignment contracts offered into evidence were undated and incomplete. However, rather than rejecting the assigned lien claims as invalid under subdivision (e) of section 4903.8, the WCAB punted the case back to a trial judge for further proceedings to address these issues.⁵

One possible way to eliminate cases such as Reshealth would be to require lien filers to submit a structured standardized form to ensure that the requisite information is provided including: 1. date of assignment; 2. indication that the lien is assigned, if applicable, and, if so; 3. to whom it is assigned and reject incomplete filings.

The Power of Data

Access to data has refined our understanding of the issue. SB 863 has greatly enhanced DIR's ability to detect fraud. Among other provisions, SB 863 instituted an independent medical review (IMR) system to resolve medical treatment disputes within the workers' compensation system and mandated a number of reforms in the lien filing system. By cross-referencing IMR filings with other data sources, including

⁴ DIR is reviewing a sample of high-volume lien filers from 2013-2015 that had filed accounts receivable with the Secretary of State to determine how many also had a record of the assignment in EAMS, as required by Labor Code section 4903.8(b).

⁵ The lien claimants in this case also argued that section 4903.8 was not really a limitation on assignments, but just a requirement to award lien payments only to service providers who would then be free to turn the payment over to an assignee. Though correct in terms of the express requirements of subdivision (a) ("Any order or award . . . shall be made for payment only to the [original service provider]"), the problem underlying this argument, as exemplified in this case, is the seemingly entrenched cultural understanding or belief that concrete proof of an assignment and that services were actually provided is unnecessary unless and until someone presses the point and maybe not even then.

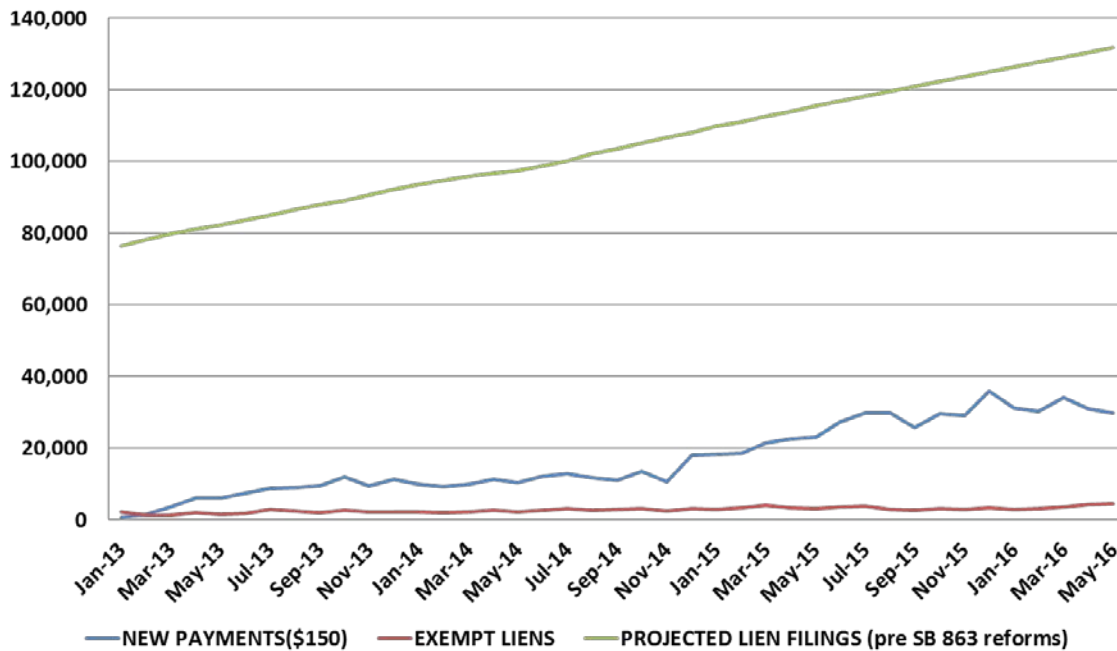
lien filings and provider billing data, we are now able to see patterns of behavior and billing among individual providers or groups of providers that might indicate fraud. This type of information was not so readily detectable in the past. As our ability to capture and to analyze this data obtained through the IMR process, in combination with data available through other DWC, WCAB, and DIR sources, becomes more robust, so, too, will our ability to detect fraud. DIR is evaluating and refining the methodology used to measure outcomes by developing standardized reporting tools and identifying incentives to improve behavior.

DIR is also conducting ongoing data measurements and monitoring/reporting in the following specific areas to evaluate the effectiveness of actions taken.

The top 1% of lien filers by volume on adjudicated cases between 2013 and 2015 discussed above included 68 businesses. Together, these entities filed 273,222 liens totaling \$2.5 billion in accounts receivable. Two of the business owners are currently under indictment, and three others have pled guilty.

As noted in Figure 1, below, between January 2013 and May 2016, nearly 700,000 liens with accompanying filing fees have been filed (for a total of nearly \$104 million in new lien filing fees), as well as nearly 114,000 liens that were exempt from filing fees. In the same period, over 461,000 previously filed liens were activated through payment of a \$100 lien activation fee (for total of \$46 million).

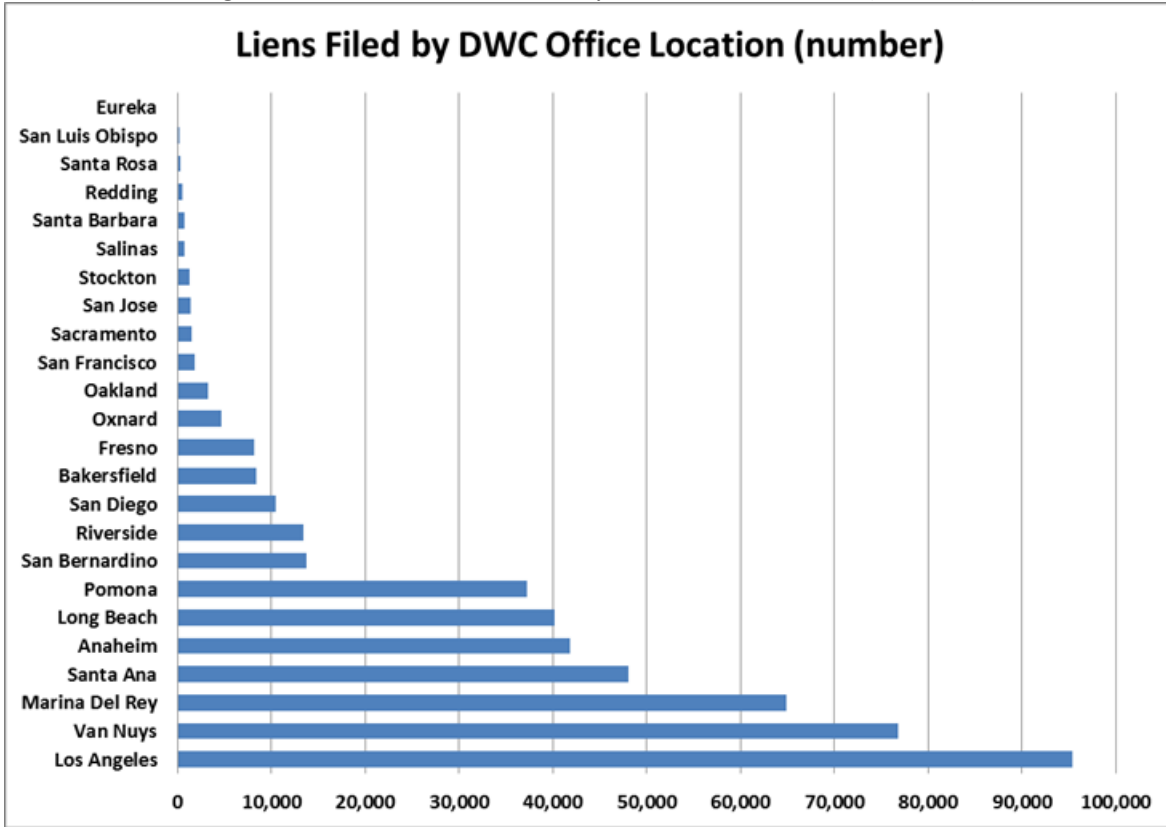
Figure 1. Monthly Lien Filings, 2013-2016



Source: DWC EAMS Lien Filing System.

Further analysis of data in the lien filing system has revealed that 95% of the filings are in Southern California, primarily concentrated (67%) in the Los Angeles basin (see Figure 2).

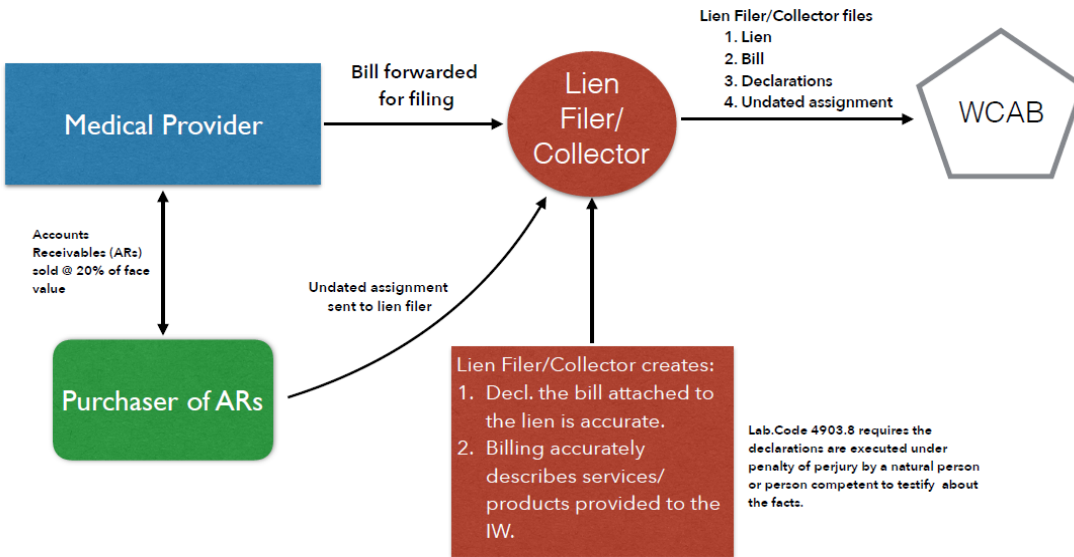
Figure 2. Liens Filed in Q3 2015 by DWC Office Location (number)



Source: DWC EAMS Lien Filing System.

Most liens are filed for denied cases, which are not subject to utilization review to determine whether the treatment is reasonable and necessary. Filing dates suggest that lien claimants tend to wait until after the case-in-chief is settled, rather than seeking early resolution of medical necessity. In current practice, even if lien claimants (particularly those who bundle and buy/sell accounts receivable) only make pennies on the dollar, returns can still be high. Many of these liens are generated despite Labor Code section 4903.8's restrictions on the assignment of lien claims, as shown in Figure 3.

Figure 3. Diagram of Lien Generation



Clear patterns emerge from an examination of lien claim data for the third quarter of 2015. For the period analyzed, 1,232 medical providers filed 76,756 medical and medical-legal liens with charges totaling \$714.6 million. Over 75% of the amount and volume of medical lien claims was attributed to the top 10% of filers, primarily in radiology, pharmacy, and medical groups and centers.

Impact on the Courts

The volume and practices of lien filings have had a considerable impact on the workload and efficacy of the courts in the workers' compensation system. The key issues include:

1. Lien claimant litigation clogs the courts, and the court time devoted to these claims takes away from the time available for injured workers.
2. Injured workers have become a commodity used by medical providers and cappers.⁶
3. Injured workers have been harmed and have even lost their lives due to incorrect and inappropriate treatment.
4. Assignments allow for fraud and for the buying and selling of those injured workers' treatment.
5. Indicted providers use lien collection to finance their defense.

⁶ A capper is someone used to procure clients or patients. Insurance Code section 1871.1(a) states: "It is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to Division 4 (commencing with Section 3200) of the Labor Code or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer."

6. Millions of dollars are spent every year on the oversight and regulation of medical treatment because of the high prevalence of fraud in the system.
7. Under our current laws, medical providers who have been convicted may still collect on their liens at the WCAB.
8. Because lien claimant representatives typically are not attorneys and are paid based on the amounts collected, the providers do not have to pay directly for representation. This places defendants who pay their own attorneys to defend these cases at a disadvantage and often makes it more cost effective to pay or settle a fraudulent lien claim than to fight it.

Potential Solutions

DIR has been working with stakeholders to identify potential solutions to these problems. Two ideas have been proposed to curb the nefarious behavior of a few providers that creates exorbitant costs and friction for everyone in the system.

1. Any physician or provider who has pled guilty or no contest to, or who has been convicted of workers' compensation fraud, medical billing fraud, insurance fraud, or Medicare or MediCal fraud shall be barred from pursuing recovery on any workers' compensation bill or lien.
2. Liens filed by a physician or provider who is criminally charged with workers' compensation fraud, medical billing fraud, insurance fraud, or Medicare or Medi-Cal fraud shall be automatically stayed pending the disposition of criminal case.

Estimated Inappropriate Costs to System

If the provisions identified as potential solutions above were to be adopted, the system-wide cost avoidance could be substantial.

Issues and Impact of Lien Filing in California Workers' Compensation System

Table 1. Totals for Liens Filed by Parties Indicted and/or Convicted, 2011-2015, WCAB Cases
 Total Liens: 579,787; Total Lien Amounts: \$4,066,059,795

	Number(#)/Amount(\$)
Number of liens filed by indicted and/or convicted parties	97,079
Number of liens in system filed by indicted parties	80,532
Amount (\$) of liens in system filed by indicted parties	\$508,210,868
Number of liens in system filed by parties that either offered a plea or were convicted	16,547
Amount (\$) of liens in system filed by parties that either offered a plea or were convicted	\$91,107,125
Percent of all liens in system filed by indicted and/or convicted parties	17%
Total amount (\$) liens in system filed by indicted and/or convicted parties	\$599,317,993

Sources: DWC Lien Filing System, data current as of August 11, 2016; various court sources on indictments, pleas, and convictions.

As shown in Table 1, 17% of all liens in the system were filed by indicted or convicted parties to date. Importantly, the dollars tied to these liens totaled \$599,317,993, which, if paid, would be an additional cost to the system.