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LIENS AND LEECHES: THE UNFAIR APPLICATION OF THE ILLINOIS HEALTH CARE SERVICES LIEN ACT AND THE NEED FOR REFORM

INTRODUCTION

Imagine a typical morning. You are driving with your spouse, talking casually and planning the day ahead. Suddenly, a vehicle crashes into you. The collision causes extensive injury to you and your spouse. On your way to the hospital you are not worrying about the price of your medical treatment; after all, you are paying significant premiums for your health insurance.¹ You affirmatively tell yourself that situations like this are exactly the reason you are mandated to have health insurance.² You also figure that your medical bills will be significantly reduced due to your coverage.³ With all this in mind, you assume you will be adequately compensated after suing the driver at fault. Two Illinois residents found themselves in this exact situation in August 2010.⁴

Blagota and Tomica Premovic assumed the foregoing.⁵ Unfortunately, their assumptions, no matter how logical and grounded in no-

1. Health insurance premiums for insureds have steadily risen in the past years. See Ameet Sachdev, *Blue Cross Premiums Jump More than 17 Percent in Illinois*, CHI. TRIBUNE (Nov. 16, 2015), <http://www.chicagotribune.com/business/ct-blue-cross-aca-premiums-1116-biz-20151113-story.html>; See also Lisa Schencker, *Illinois' Obamacare Plans Seek Big 2017 Premium Hikes*, CHI. TRIBUNE (Aug. 2, 2016), <http://www.chicagotribune.com/business/ct-illinois-obamacare-rates-0802-biz-20160801-story.html>.

2. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

3. There are several varieties of plans offered to consumers, the most common are Exclusive Provider Organizations (EPO), Health Maintenance Organizations (HMO), Point of Service (POS), Preferred Provider Organizations (PPO), Medicare and Medicaid. Ashlee Kieler, *Insurance Loopholes & Master Pricing: How Surprise Medical Bills Knock Consumers Down*, CONSUMERIST (Sept. 24, 2015), <https://consumerist.com/2015/09/24/a-loopholes-and-master-pricing-how-surprise-medical-bills-knock-consumers-down/>.

4. There were 296,049 crashes involving motor vehicles in 2014 in Illinois. ILL. DEP'T OF TRANSP., 2014 ILLINOIS CRASH FACTS & STATISTICS 8 (2014), <http://www.idot.illinois.gov/Assets/uploads/files/Transportation-System/Resources/Safety/Crash-Reports/crash-facts/2014%20CF.pdf>. Illinois defines crash as “an occurrence that takes place on public roadways, involving a moving motor vehicle and produces death, injury, or damage in excess of \$1,500 to any one person’s property when all drivers in the crash are insured. If the driver does not have insurance, the threshold is \$500.” *Id.* at 49.

5. Jeff Overley, *Ill. Hospital Tried To Swipe Patients' Settlement Cash, Suit Says*, LAW360 (May 1, 2012), <http://www.law360.com/articles/335839/ill-hospital-tried-to-swipe-patients-settlement-cash-suit-says>.

tions of fairness, were wrong.⁶ The hospital where they received treatment did not bill their insurance. Instead, the hospital filed a lien under the Illinois Health Care Services Lien Act (the “Act”) for the full amount of the medical services rendered.⁷ By filing this lien the hospital avoided the substantial discounts that the Premovic’s insurance policy provided.⁸ Ultimately, the Premovics received a settlement of \$27,000, while the hospital liens totaled approximately \$8,500.⁹ The Act expressly provides that hospitals facing situations like this can assert liens equal to the costs of the medical services rendered.¹⁰ The Act does not explicitly require hospitals to bill their patient’s health insurance to reflect the discounted rate, which allows hospitals to recover more money to the detriment of the injured individual.¹¹ If the tort system is founded upon notions of “making whole” those persons who have been injured, how and why is this justified?¹²

The Premovics’ situation is an unfortunate yet common issue for Illinois tort plaintiffs because the Act gives health care providers and professionals a mechanism that allows them to unjustly receive damage awards that rightly belong to the injured plaintiff. The Act incentivizes health care providers and professionals to assert medical liens, rather than submitting medical bills to insurance companies.¹³ Under this scheme, injured parties are not given the substantial discounts their insurance policy mandates, and health care providers are able to recover the inflated rates via the judicial liens.¹⁴

This Comment argues that the Illinois legislature’s and judiciary’s failure to address this problem is unacceptable for it acts as a barrier to substantial recovery and, in some instances, creates a reluctance to file suit. This Comment further argues that Illinois should adopt a reading of the current Health Maintenance Organization Act (HMO Act) that requires health care providers and professionals to accept

6. *Id.* See generally 770 ILL. COMP. STAT. ANN. 23 (West 2003).

7. *Id.*

8. *Id.*

9. *Id.*

10. 770 ILL. COMP. STAT. ANN. 23/10 (West 2003).

11. 770 ILL. COMP. STAT. ANN. 23 (West 2003).

12. Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 60, 63 (1997).

13. There is no requirement that health care providers and professionals bill their patient’s medical insurance. 770 ILL. COMP. STAT. 23 (2016).

14. 770 ILL. COMP. STAT. 23/10 (2016). This guaranteed recovery does not occur when the total amount of all liens under the Act meets or exceeds 40% of the plaintiff’s verdict. 770 ILL. COMP. STAT. 23/10(c) (2016).

the contractual amounts negotiated by plaintiffs' health insurance provider.¹⁵

Part II provides a general background of different types of liens and how they attach to damages awards.¹⁶ Next, it explores the relevant history of health care liens in Illinois laws prior to 2003.¹⁷ It then provides rationales behind the enactment of health care lien laws and the difficulties plaintiffs encounter when trying to challenge the "reasonable charges" of the health care providers and professionals. Lastly, Part II describes the interplay between the Act and the Attorney's Lien Act.¹⁸

Part III argues that the Act incentivizes medical providers and professionals to assert liens to maximize their financial recovery, leaving personal injury plaintiffs with a decreased damages amount.¹⁹ This incentive can largely be attributed to Illinois judicial decisions that have not required medical providers to comply with insurance contracts that suggest lower rates of service.

Part IV argues that personal injury plaintiffs are disincentivized from bringing suit because of (1) judicial interpretations of the Act, (2) the high cost of litigation, and (3) the Act's favorable treatment of medical providers. Part IV concludes with an analysis of the HMO Act prior to and subsequent from the enactment of the Health Care Services Lien Act, which reveals numerous inconsistencies in Illinois courts.

Part V concludes that applying the existing HMO Act would provide compensatory balance between plaintiffs and medical providers, and it would also accomplish one of the purposes of the Health Care Services Lien Act—to incentivize plaintiffs to bring lawsuits when injured by a tortfeasor.

II. BACKGROUND

Section A begins by defining and identifying different types of liens, including the way Illinois courts have defined "liens" within the Act. Section B describes the state of the "reasonable value of medical services," a term often used in medical lien statutes. Section C then de-

15. 215 ILL. COMP. STAT. 125/2-8(a) (2016).

16. See *infra* notes 20–28 and accompanying text.

17. What follows is an analysis of the Illinois Health Care Services Lien Act, 770 ILL. COMP. STAT. 23 (2016), from its enactment in 2003 to the present, including the legislative history preceding its enactment and the role the Illinois Supreme Court played in the motive behind the enactment in 2003.

18. 770 ILL. COMP. STAT. 5/1 (2016).

19. See *infra* notes 122–280 and accompanying text.

scribes medical liens prior to 2003. Section D then details the legislative history of the 2003 Act and its purported purpose, before turning to its operative provisions and effects. Section E explores the 2012 Amendment to the Act. Section F provides the rationales for health care lien acts and how to contest the reasonableness of hospital charges. Section G provides background of the common fund doctrine and attorney's fees, both of which are components to a major battleground in fee-shifting and, in turn, a plaintiff's recovery. Finally, Section H addresses Medicare and Medicaid purpose and coverage.

A. *Liens*

To fully grasp how the Act works for health care providers and professionals the concept of the lien must be analyzed. In general there are three types of liens: common law liens, equitable liens, and statutory liens.²⁰ Common law liens are the result of services performed by the lienholder in relation to the property to which the lien attaches.²¹ Common law liens establish the lienholder's right to retain possession of the debtor's property until that debt is satisfied.²² Equitable liens are created by courts as a remedy for a debt owed, which can arise from an express or implied agreement, or can be granted by the court to prevent unjust enrichment.²³ Statutory liens are created by the legislature and generally provide liens to persons who did not otherwise have one at common law.²⁴ The Act is an example of the creation of a statutory lien.

B. *How Medical Providers Determine Rates for Services Rendered*

Health care liens have changed how health care providers charge and ultimately collect for services rendered.²⁵ Historically, health care providers were free to set and collect the amount they billed pa-

20. 51 AM. JUR. 2D *Liens* § 7 (2016).

21. R.J. Robertson, *Attorney's Liens in Illinois: An Analysis and Critique*, 30 S. ILL. U. L.J. 1, 3 (2005). An example of a common law lien is where a bailee increases the value of the bailor's property for the value of the bailee's services. *Id.*

22. *Id.*

23. *Id.* at 5. An example of an equitable lien is where one makes valuable improvements on another's property with that person's knowledge and consent; a lien is recognized in order to prevent unjust enrichment. *Id.*

24. *Id.* In Illinois, the Attorney's Lien Act and the Health Care Services Lien act are two examples of statutory liens enacted to provide liens to persons who did not have them at common law. *Id.* at 4 & n.20.

25. These changes have resulted in numerous lawsuits filed challenging the validity of the laws. *See infra* note 239.

tients.²⁶ Hospitals set these rates using a system commonly referred to as a “chargemaster.”²⁷ A chargemaster is a list of the rates for each procedure a hospital performs, as well as the price of every item used during the procedure.²⁸ With the exception of one state, hospitals are not required to post their chargemaster lists for the public to view.²⁹ Keeping the list private provides a safeguard that shields hospitals from pressure to lower their rates.³⁰ Recent studies have been released to bring transparency to chargemaster rates.³¹ Additionally, hospital officials have even admitted the rates they initially charge serve no purpose other than establishing the starting point for negotiations.³²

Understanding the history and purpose of health care lien acts is necessary to fully comprehend why hospitals and health care providers assert liens. These acts were first introduced in the 1930s with two main purposes: (1) to protect hospitals from the heavy burden of treating insolvent or uninsured patients, and (2) to incentivize hospitals to treat a patient before checking whether the patient could actually pay for the services rendered.³³ However, these initial policy rationales have slowly eroded as the percentage of those with health insurance in 1940 (9.3%) pales in comparison to those with health insurance today.³⁴

To combat the burden of treating insolvent and uninsured patients, the Act addresses this issue by providing automatic recovery for hospitals regardless of the insurance or income status of the patient.³⁵ The Act goes further in its defense of hospitals by affording them the right to pursue patients for any leftover charges after the lien is satis-

26. Michael K. Beard & Dylan H. Marsh, *Arbitrary Healthcare Pricing and the Misuse of Hospital Lien Statutes by Healthcare Providers*, 38 AM. J. TRIAL ADVOC. 255 (2014).

27. Uwe E. Reinhardt, *The Pricing of U.S. Hospital Services: Chaos Behind a Veil of Secrecy*, 25 HEALTH AFFAIRS 57, 58 (2006).

28. *Id.*

29. *Id.* at 59. California is the only state that requires their chargemaster rates be available to the public.

30. Beard & Marsh, *supra* note 30, at 270.

31. *Id.* at 256–257.

32. *Id.* at 256.

33. *Id.* at 257.

34. See U.S. CENSUS BUREAU, VITAL STATISTICS AND HEALTH AND MEDICAL CARE, at 82, available at <http://www2.census.gov/prod2/statcomp/documents/CT1970p1-03.pdf>.

35. 770 ILL. COMP. STAT. 23/10 (2016); Lisa Schenker, *Uninsured rate drops again in Illinois after Obamacare takes effect*, CHI. TRIBUNE (Sept. 13, 2016), <http://www.chicagotribune.com/business/ct-census-uninsured-obamacare-0914-biz-20160913-story.html> (explaining, as of the beginning of 2016, the uninsured rate in the United States was 9.4%).

fied.³⁶ These two mechanisms are especially important because the Act provides that charges that can be claimed are “reasonable charges” for the services rendered.³⁷ Crucially, the Act does not include a definition of “reasonable charges.”³⁸ Thus, the private nature of the chargemaster system, the automatic recovery of payment via the liens, along with the ability to seek additional compensation after the lien has been satisfied, has provided hospitals with complete control over how much they can charge and collect from patients.

C. *Illinois Medical Liens Prior to 2003*

The state of health care liens prior to the Act was convoluted.³⁹ There were eight different medical lien acts that, depending on the profession, entitled individuals to assert liens against personal injury plaintiffs.⁴⁰ Case law interpreting these acts was particularly unfavorable to personal injury plaintiffs.⁴¹ In 1997 the Supreme Court of Illinois in *Burrell v. Southern Truss* held that when liens were asserted under two different medical lien acts, the total value of liens could exceed one-third of the plaintiff’s settlement.⁴² While in *Burrell*, the amount exceeding one-third of the plaintiff’s recovery was a mere \$82.53, the dissenting opinion written by Justice Harrison noted there may be cases where the plaintiff receives nothing after the various liens are asserted.⁴³ The majority in *Burrell* found support for its conclusion in the House Proceedings, which revealed that all such liens were to be treated “on the same footing.”⁴⁴ Thus, prior to 2003 personal injury plaintiffs in Illinois could potentially win a lawsuit against

36. 770 ILL. COMP. STAT. 23/45 (2016). This section allows for the person holding the lien to initiate proceedings against the personal injury plaintiff if the entire total billed amount is not satisfied after the lien is satisfied under the Act. *Id.*

37. Beard & Marsh, *supra* note 30, at 272.

38. *Id.*

39. “Health care liens” encompass the categories of health care professionals and health care providers under 770 ILL. COMP. STAT. 23 (2016).

40. The Clinical Psychologists Lien Act, 770 ILL. COMP. STAT. 10 (repealed 2003); The Dentists Lien Act, 770 ILL. COMP. STAT. 20 (repealed 2003); The Emergency Services Personnel Lien Act, 770 ILL. COMP. STAT. 22 (repealed 2003); The Home Health Agency Lien Act, 770 ILL. COMP. STAT. 25 (repealed 2003); The Hospital Lien Act, 770 ILL. COMP. STAT. 35 (repealed 2003); The Optometrists Lien Act, 770 ILL. COMP. STAT. 72 (repealed 2003); The Physical Therapist Lien Act, 770 ILL. COMP. STAT. 75 (repealed 2003); The Physicians Lien Act, 770 ILL. COMP. STAT. 80 (repealed 2003).

41. *Burrell v. Southern Truss*, 679 N.E.2d 1230, 1232 (Ill. 1997).

42. *Id.*

43. *Id.* at 1233–34.

44. *Id.* at 1233.

a tortfeasor yet still not receive any compensation after accounting for health care liens and the attorney's fees.⁴⁵

D. Enactment of the Illinois Health Care Services Lien Act

The legislative proceedings prior to the enactment of the Health Care Services Lien Act were hotly debated.⁴⁶ Senator John Cullerton, the Senate representative speaking on behalf of the bill stated:

The reason for the bill is that . . . if [the liens are] not limited and [health care providers are] . . . allowed to . . . apply their one-third to the total judgment, you could have the entire potential judgment locked up in liens, so that there's no incentive for the injured party to even bring the lawsuit in the first place.⁴⁷

He further remarked that the Act was a response to *Burrell*, as he explicitly stated that the Court incorrectly interpreted the prior medical lien statutes.⁴⁸ Both the Illinois State Medical Society and the Illinois Health and Hospital Association opposed the bill.⁴⁹ Their opposition to this bill was in large part due to the burdens it placed on hospitals and doctors.⁵⁰ Even stronger opposition existed in the House of Representatives. One representative went so far as to call the bill "for lawyers."⁵¹ Many believed the bill put health care providers last, with no guarantee they would ever get paid for their services.⁵² Despite strong opposition from both the House and Senate, the Bill passed and was signed by the Governor on June 30, 2003.⁵³

45. *Id.* at 1234.

46. S., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess. (Ill. Apr. 03, 2003).

47. *Id.* at 87–88.

48. *Id.* at 88. Senator John Cullerton stated:

And this is what the practice was, where all of these were collectively read together and it was – a total of one-third was their lien, up until this *Burrell* case, which came down a few years ago, and the Supreme Court, on a five-to-four decision, read it differently, and we're trying to reverse that.

Id.

49. *Id.* at 85. That these parties opposed the bill is no surprise. The Illinois State Medical Society represents the physicians of Illinois while the Illinois Health and Hospital Association represents the hospitals of Illinois. The previous interpretation of the various lien acts in Illinois, as applied by *Burrell*, allowed for the possibility of significantly more compensation for the groups these two entities represent. *Burrell v. Southern Truss*, 679 N.E.2d 1230, 1232 (Ill. 1997).

50. S., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess., at 85 (Ill. Apr. 03, 2003).

51. H.R., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess., at 33 (Ill. May 27, 2003). For a House breakdown on voting, see H.R., 93rd Gen. Assemb., (Ill. May 27, 2003), available at http://www.ilga.gov/legislation/votehistory/93/house/09300SB0274_05272003_005000T.pdf (voting list describing 77 yeas, 34 nays, and 3 present); for a Senate breakdown on voting, see S., 93rd Gen. Assemb., (Ill. May 30, 2003), available at http://www.ilga.gov/legislation/votehistory/93/senate/09300SB0274_05302003_027000C.pdf (voting list describing 59 yeas, 0 nays, and 0 present).

52. See H.R., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess., at 33 (Ill. May 27, 2003).

53. S. 274, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003).

There are three major components to the Act. The first component describes the process by which health care providers and professionals must assert liens.⁵⁴ The second component creates the lien and limits the amount that can be asserted.⁵⁵ The Act provides that every health care professional and provider who treats an injured person shall have a lien upon all claims and causes of action for all reasonable charges.⁵⁶ A health care provider is defined under the Act as any “licensed hospital, licensed home health agency, licensed ambulatory surgical treatment center, licensed long-term care facilities, or licensed emergency medical services personnel.”⁵⁷ Most importantly, the “total amount of all liens under [the] Act shall not exceed 40%” of the plaintiff’s verdict, judgment, award or settlement.⁵⁸

The third component of the Act explains the rights of lienholders. All lienholders under the Act share proportionate amounts within the forty percent limitation.⁵⁹ The limitations can only be waived or reduced by the lienholder.⁶⁰ No individual from either the health care professional category or health care provider category can receive more than one-third of the verdict or judgment.⁶¹ The Act provides special procedures for when the total amount of the liens asserted exceeds forty percent of the verdict or judgment.⁶² When this situation arises, the health care professionals’ liens are split into a separate group from the health care providers’ liens. Thereafter, neither group can recover more than twenty percent of the verdict.⁶³ These procedures are followed with a caveat that all liens under the Act are to be satisfied “to the extent possible for all health care professionals and providers by reallocating the amount unused within the aggregate total limitation of 40%.”⁶⁴ The limit on any one individual lien asserted under the Act remains one-third of the total judgment.⁶⁵

Lastly, the Act provides further support for health care professionals and providers in Section 45. This section provides that nothing in

54. 770 ILL. COMP. STAT. 23/10(b) (2016).

55. 770 ILL. COMP. STAT. 23/10(a) (2016).

56. *Id.*

57. 770 ILL. COMP. STAT. 23/5 (2016).

58. 770 ILL. COMP. STAT. 23/10(a) (2016); *see infra* notes 131–47 and accompanying text (explaining how, even in light of the plain language of the Act, the plaintiff’s compensation can result in nothing after accounting for attorney’s fees and costs).

59. 770 ILL. COMP. STAT. 23/10(c) (2016).

60. *Id.*

61. *Id.*

62. *Id.*

63. 770 ILL. COMP. STAT. 23/10(c)(1) (2016).

64. *Id.*

65. *Id.*

the Act should be construed as limiting the right of a health care professional or provider to pursue collection of its reasonable charges for the services it furnishes to the injured plaintiff.⁶⁶ Thus, those asserting liens under the Act are able to seek the amounts left over after the verdict is dispersed. The party seeking these residual funds can bring a lawsuit, or any other lawful means of pursuing the amount, against the plaintiff for the remaining amount of the charges.⁶⁷ This section, therefore, reflects the intent of the legislature to protect healthcare providers and professionals.⁶⁸

E. The 2012 Amendment

The Act was amended on August 21, 2012.⁶⁹ When first introduced, the amendment decreased the amount of money health care providers and professionals could sue for if not fully compensated after the liens had been fulfilled.⁷⁰ The proposed language also provided that if health insurance or private or public benefits were available to pay a medical bill, the lien asserted under the Act would be limited to the rates established by those benefits.⁷¹ After debates concerning the proposed amendments, this limiting language was taken out before the bill passed in the House of Representatives.⁷²

The House gave no reasoning as to why the language was taken out.⁷³ However, the Illinois Health and Hospital Association, the Illinois State Medical Society, and other associations in opposition to the language of the proposed amendment, were no longer opposed after the limiting language was withdrawn.⁷⁴ Through the 2012 Amendment, the Illinois Legislature showed its willingness to amend the Act, but not on terms helpful to personal injury plaintiffs.

F. Contesting Reasonableness of Charges

Similar to statutes in other states the Act does not define the “reasonable charges” for the services rendered.⁷⁵ The amount hospitals bill for their services comes from the “chargemaster” list, which is not

66. 770 ILL. COMP. STAT. 23/45 (2016).

67. *Id.*

68. S., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess., at 85–86 (Ill. Apr. 03, 2003).

69. Illinois Health Care Services Lien Act of 2013, Pub. L. No. 097-1042.

70. H.B. 5823, 97th Gen. Assemb., Reg. Sess. (Ill. 2012).

71. *Id.*

72. H.R., Transcript of Debates, 97th Gen. Assemb., Reg. Sess., at 284–86 (Ill. Mar. 29, 2012).

73. *Id.* at 283.

74. *Id.* at 285–86.

75. 770 ILL. COMP. STAT. 23 (2016); Beard & Marsh, *supra* note 30, at 273.

required to be available to the public.⁷⁶ Thus, establishing the “reasonableness” of the charges is somewhat elementary for the hospital as it simply entails the hospital administrator or physician testifying that the charges are customary and reasonable; this testimony alone typically suffices for proof of reasonableness.⁷⁷ The impact of governmental payors and private insurance on the reasonableness standard has been applied inconsistently in the courts.⁷⁸

Thus, plaintiffs wishing to contest the reasonableness of the charges face a tall task. The biggest obstacle in proving a charge was unreasonable is presenting sufficient evidence undermining the chargemaster rates of the hospital.⁷⁹ Despite hospitals exerting near total control in setting rates and even though industry experts have acknowledged the prices are arbitrary,⁸⁰ courts across the country have upheld bloated rates.⁸¹ In addition to considering background information regarding the chargemaster rates, some courts have examined the reasonableness of charges through expert testimony, industry custom, the prices charged by other hospitals in the community, and amounts accepted by the hospitals from insurers and governmental payors.⁸²

The test for contesting the reasonableness of medical charges under the Act has not been explicitly outlined by Illinois courts. Prior to passage of the Act, however, an Illinois appellate court recognized that expert witness testimony could be sufficient to contest the reasonableness of the charges.⁸³ Even in the absence of expert testimony data has revealed the completely arbitrary nature of the charges.⁸⁴ An alarming example of the disparities in medical charges was found in joint replacement procedures for Medicare recipients: from

76. Reinhardt, *supra* note 31, at 58–59.

77. Beard & Marsh, *supra* note 30, at 272–73.

78. *Id.* at 273; *see* discussion *infra* notes 208–17 (describing *Wills* decision that allows for personal injury plaintiffs to present evidence of the full, non-discounted amount of their medical bills to the court).

79. Beard & Marsh, *supra* note 30, at 276–77.

80. Reinhardt, *supra* note 31, at 58–59; *see also* James McGrath, *Overcharging the Uninsured in Hospitals: Shifting a Greater Share of Uncompensated Medical Care Costs to the Federal Government*, 26 QUINNIAC L. REV. 173, 184–85 (2007).

81. Beard & Marsh, *supra* note 30, at 277–81.

82. *Id.* at 278–79.

83. *Temesvary v. Houdek*, 703 N.E.2d 613 (Ill. App. Ct. 1998) (holding that, under the Physician’s Lien Act, the trial court decision to reduce the doctor’s lien based off expert testimony was against the manifest weight of evidence).

84. CENTERS FOR MEDICARE & MEDICAID SERVICES, MEDICARE PROVIDER UTILIZATION AND PAYMENT DATA: INPATIENT (last modified Aug. 30, 2017), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Medicare-Provider-Charge-Data/Inpatient.html>.

\$5,304.00 in Oklahoma to \$223,373.00 in California.⁸⁵ Plaintiffs in Illinois face an uphill climb in order to successfully contest the substantial chargemaster rates.

G. Attorney Compensation, the Common Fund Doctrine, and the Act

The Illinois Attorneys Lien Act governs the liens asserted by attorneys.⁸⁶ How these liens attach is no different than the way in which they attach under the Act. The Attorneys Lien Act generally provides that attorneys shall have a lien upon all claims for an amount previously agreed upon by the attorney and client.⁸⁷ In the absence of an explicit agreement the lien amount will be the reasonable fees associated with such suits, plus costs and expenses.⁸⁸ Specifically, the Attorneys Lien Act provides that when all liens under the Health Care Services Lien Act meet or exceed forty percent of the recovery, the total amount of all liens under the Attorneys Lien Act shall not exceed thirty percent.⁸⁹ In this circumstance, all attorneys must share proportionate amounts within the thirty percent statutory limitation.⁹⁰

Illinois courts provided further protection for health care providers and professionals in their interpretation of the Health Care Services Lien Act in relation to the common fund doctrine.⁹¹ The common fund doctrine provides that a party who creates, preserves, or increases the value of a fund in which others have an ownership interest, be reimbursed from that fund.⁹² As applied to attorneys, those who recover a common fund for the benefit of persons other than himself or the client are entitled to a reasonable attorney's fee from the fund as a whole.⁹³ The rationale for reimbursing attorneys from a common fund is that unless the costs of litigation are spread to the beneficiaries

85. Wilson Andrews et al., *Disparity in Medical Billing*, WASH. POST (May 8, 2013), <http://www.washingtonpost.com/wp-srv/special/national/actual-cost-of-medical-care/>; Sarah Kliff & Dan Keating, *One Hospital Charges \$8,000—Another, \$38,000*, WASH. POST (May 8, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/08/one-hospital-charges-8000-another-38000/?utm_term=.8b4870105fdc.

86. 770 ILL. COMP. STAT. 5/1 (2016).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* Altogether, the plaintiff would relinquish seventy percent of his damages award in this circumstance.

91. *Wendling v. S. Ill. Hosp. Servs.*, 950 N.E.2d 646, 647 (Ill. 2011).

92. *Scholtens v. Schneider*, 671 N.E.2d 657, 662 (Ill. 1996).

93. *Id.*

of the fund, those beneficiaries will be unjustly enriched by the attorney's efforts throughout the litigation.⁹⁴

The Illinois Supreme Court in 2011 analyzed whether or not a hospital should be required to contribute to the common fund in relation to the Act.⁹⁵ The Illinois Supreme Court in *Wendling* held that the common fund doctrine is not applicable to health care liens under the Act.⁹⁶ The court relied almost exclusively on precedent, noting that Illinois courts had never applied the common fund doctrine to a creditor-debtor relationship, which is exactly the relationship between the lienholder hospitals and the personal injury plaintiffs.⁹⁷ The Court also relied upon analysis from courts in other states that held the common fund doctrine should not apply to similar situations.⁹⁸

The Court in *Wendling* held the hospitals were not unjustly enriched and therefore the common fund doctrine did not apply, because their claims for services rendered were not contingent on the personal injury plaintiff's rights against a third party or the creation of a fund.⁹⁹ The court reasoned that because the hospitals' claims existed irrespective of the outcome of the lawsuit, the hospitals did not directly benefit from the efforts of the plaintiff's attorneys.¹⁰⁰ Despite the *Wendling* court's assurance that their holding was grounded in precedent and sound logic, its decision has been criticized.¹⁰¹ The Court's decision in *Wendling* operates to allow hospitals to retain even more compensation after a judgment is obtained.

H. Medicare and Medicaid

Medicare is a federal program created to provide health care to elderly and disabled persons.¹⁰² The Medicare system provides hospitals with a predetermined cost for the services they provide to a patient.¹⁰³

94. *Id.* at 663.

95. *Wendling v. S. Ill. Hosp. Servs.*, 950 N.E.2d 646, 647 (Ill. 2011).

96. *Id.*

97. *Id.* at 648. The Court mentioned the following as controlling precedent: *Watkins v. GMAC Fin. Servs.*, 785 N.E.2d 40 (Ill. App. Ct. 2003); *Vill. of Clarendon Hills v. Mulder*, 663 N.E.2d 435 (Ill. App. Ct. 1996); *Wheaton v. Dep't of Pub. Aid*, 416 N.E.2d 780 (Ill. App. Ct. 1981).

98. *Id.*

99. *Id.* at 651.

100. *Id.*

101. See Ayla Ellison, *Physical and Financial Injuries: The Common Fund Doctrine and its Application under the Illinois Health Care Services Lien Act*, 34 N. ILL. U. L. REV. 305, 320, 324–25 (2014) for a comprehensive analysis of *Wendling*, the common fund doctrine, and a critique of the current system in Illinois.

102. Beard & Marsh, *supra* note 30, at 267.

103. Daniel L. Saar, Note, *Blindsided (Again): Iowa Hospitals' Abuse of the Hospital Lien Statute and What Has Been Done to Correct It*, 56 DRAKE L. REV. 463, 474 (2008).

The payment is then determined by the “diagnosis-related group” formula.¹⁰⁴ The results are reduced payments per Medicare beneficiary, and in turn the hospitals providing these services are paid less than the costs of their services.¹⁰⁵ Additionally, the Medicare Secondary Payer Act disallows Medicare payment for any service when payment “has been made or can reasonably be expected to be made. . . . under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.”¹⁰⁶ Further, the Centers for Medicare and Medicaid Services has a right of action to recover payment from any entity, including a beneficiary, provider, physician, or attorney.¹⁰⁷

The Illinois Medicaid program is codified in the Illinois Public Aid Code.¹⁰⁸ Medicaid provides health insurance for the state’s insolvent.¹⁰⁹ Pertinent to this discussion, the Code provides that the Illinois Department of Healthcare and Family Services has a “charge upon all claims, demands, and causes of action for injuries” to someone who has applied for or received financial aid, including health care benefits.¹¹⁰ Additionally, the charges, demands, or causes of action under which Medicaid has a lien take priority over all other liens that exist under Illinois law.¹¹¹ Therefore, in a case where various parties have filed liens under the Act, including services rendered under the Illinois Public Aid Code, the charges for Medicaid services are not included in the Act’s computation.¹¹²

104. *Id.*

105. *Id.* For instance, “As a result of this reduced payment per beneficiary, Iowa hospitals are paid \$588 less per Medicare case than other Midwestern states and \$1,020 less per Medicare case than the national average.” *Id.*

106. 42 U.S.C. § 1395y(b)(2)(A)(ii) (2012). A Medicare Secondary Payer “is the term generally used when the Medicare program does not have primary payment responsibility – that is, when another entity has the responsibility for paying before Medicare.” Centers for Medicare & Medicaid Services, *Medicare Secondary Payor*, <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Medicare-Secondary-Payer/Medicare-Secondary-Payer.html>. In other words, Medicare is a secondary payor when the Medicare beneficiary’s hospital bill is covered by liability insurance.

107. 42 C.F.R. § 411.24(g) (2012).

108. 305 ILL. COMP. STAT. 5/11-22 (2016).

109. Beard & Marsh, *supra* note 30, at 269.

110. 305 ILL. COMP. STAT. 5/11-22 (2016).

111. *Id.* The exception to this priority system is the attorney’s lien under the Attorney’s Lien Act. “This Section shall not affect the priority of an attorney’s lien under the Attorney’s Lien Act.”

112. *McKim v. S. Ill. Hosp. Servs.*, 61 N.E.3d 946 (Ill App. Ct. 2016).

III. ANALYSIS

Section A analyzes Illinois case law and how judicial interpretation of the Act has created barriers to lawsuits. These cases address the issue of whether medical providers must bill the health insurance of the insured. The argument is that medical providers must do this because plaintiffs are third-party beneficiaries of the insurance contracts. Section B then analyzes the interplay between attorneys fees, the common fund doctrine, and the Act illustrating the fact that Illinois courts have been reluctant to agree to fee-shifting at the expense of medical providers. Next, Section C analyzes whether attorneys fees and costs should be deducted from the lien amount under the Act before adjudicating the liens. Section D then analyzes the impact of Medicare and Medicaid on the Act, showing that courts have found in favor of plaintiffs on a small number of issues here, but the key and most costly issues still favor medical providers. Section E discusses those small victories for personal injury plaintiffs, primarily the collateral source rule as applied to Medicare and Medicaid discounts. Lastly, Section F discusses the HMO Act, its application to medical liens prior to and after 2003, and how Illinois courts have inconsistently applied it to the detriment of personal injury plaintiffs.

A. Should Hospitals be Required to Bill Health Insurance Companies?

Despite the Act's pro-plaintiff purpose,¹¹³ Illinois courts have considerably broadened its scope and rejected virtually every argument for limiting lien amounts that health care providers and professionals assert and receive.¹¹⁴ Plaintiffs attorneys recognize the potential for abuse of the Act by health care providers and professionals, but advocacy for change has been unsuccessful.¹¹⁵ What results is the evil the legislature sought to prevent: plaintiffs are disincentivized from bringing suit.¹¹⁶

113. "The reason for the bill is that if . . . [the liens] are not limited and [hospitals and health care providers] are allowed to apply their one-third to the total judgment, you could have the entire potential judgment locked up in liens." S., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess., at 87 (Ill. Apr. 03, 2003).

114. See *infra* notes 126–280 and accompanying text.

115. See Dennis Berkbiger, *A Strategy for Dealing with Medical Providers Who Refuse to Submit their Bills to Health Insurance*, ILL. STATE BAR ASSOC. (Feb. 2012), <https://www.isba.org/sections/tortlaw/newsletter/2012/02/astrategyfordealingwithmedicalprovi> for a common example of a plaintiffs attorney's letter to health care providers regarding assertion of liens under the Act.

116. *Id.* at 85. "So the problem is that there's not even an incentive to go out and bring the case in the first place." *Id.* at 87–88.

Perhaps the strongest and most common sense argument for the reduction of the amount that lienholders are entitled to under the Act arises in the Premovic's situation discussed above. In 2016 an Illinois appellate court decided a case that was essentially identical.¹¹⁷ The plaintiff in *Barry* sustained injuries in an automobile accident and received medical treatment from the defendant hospital.¹¹⁸ The plaintiff had health insurance through his employer; the defendant had a contract with a third party that provided plaintiff's health insurance was to receive a discount from the defendant for the medical bills.¹¹⁹ However, despite this agreement the defendant did not submit the bills to plaintiff's insurer, and thus the plaintiff was not given discounted rates.¹²⁰

The *Barry* court considered and rejected plaintiff's claims for relief.¹²¹ In its reasoning, the court quoted section 23/10(a) of the Act, noting that the plain language allowed hospitals to place liens on all patients' claims and causes of action.¹²² The plaintiff contended the hospital must bill the patient's health insurance before pursuing a lien.¹²³ According to the court, the Act does not limit the ability of hospitals and health care professionals to assert liens to situations where the patient is without health insurance or where no agreement exists between the provider and the insurance company for discounted rates.¹²⁴

The court affirmed the dismissal of the plaintiff's claims for breach of contract.¹²⁵ In that claim the plaintiff alleged the consent form signed upon arrival at the hospital was a contract and the hospital breached that contract by failing to bill the insurance company.¹²⁶ The court noted that "the consent form simply authorizes [the hospital] to bill [the insurance company]," therefore failure to do so was not a breach.¹²⁷

117. *Barry v. St. Mary's Hosp.*, Decatur, 68 N.E.3d 964 (Ill. App. Ct. 2016).

118. *Id.* at 966.

119. *Id.*

120. *Id.*

121. *Id.* at 977. Plaintiff pled causes of action for consumer fraud, breach of contract, third-party beneficiary, and unjust enrichment. *Id.* at 970.

122. *Barry*, 68 N.E.3d at 970–71.

123. *Id.* at 971

124. *Id.* "The General Assembly could have included such language in the Lien Act, but it did not. We will not depart from the plain language of a statute by reading into it exceptions, limitations, or conditions the legislature did not itself express."

125. *Id.*

126. *Id.* at 975.

127. *Barry*, 68 N.E.3d at 975.

The court was also unpersuaded by the plaintiff's stronger claim, that it was a third-party beneficiary of the contract between the hospital and the insurance company.¹²⁸ The court held dispositive an express disclaimer between the hospital and the insurance company that stated nothing in the agreement could create any additional rights or remedies for a third party.¹²⁹

In *Barry*, the court failed to take into account the expectation and reliance interests of the plaintiff. This idea of reliance has emerged due to the progression of notions of fairness within the landscape of health insurance. Due in large part to the Affordable Care Act, the number of citizens without health insurance has steadily decreased.¹³⁰ At the beginning of 2016, only 9.4% of persons in the United States were uninsured.¹³¹ The number uninsured in Illinois is 7.1%.¹³² If citizens are mandated to purchase health insurance, it would seem that fairness requires health care providers to submit bills to the health insurance companies.¹³³

The *Barry* decision is the prototypical Illinois case because it negatively affects personal injury plaintiffs with insurance coverage. Illinois courts have continuously pointed out what is missing from the Act: it does not limit a provider's ability to place liens on a plaintiff's settlement to situations (1) where the plaintiff does not have health insurance, or (2) where there is no agreement between the health care provider and the plaintiff's insurer for a discounted rate.¹³⁴ In other words, the Illinois legislature could have exempted these situations from the lien attachment process, but chose not to.¹³⁵

This method of statutory interpretation, adhering to the plain meaning of the language of the statute, is well-grounded in the Illinois judiciary.¹³⁶ However, critics of the plain meaning rule primarily argue that the rule focuses on the statutory language to the detriment of its

128. *Id.*

129. *Id.* at 976.

130. Margot Sanger-Katz & Quoc Trung Bui, *The Impact of Obamacare in Four Maps*, N.Y. TIMES (Oct. 31, 2016), <http://www.nytimes.com/interactive/2016/10/31/upshot/up-uninsured-2016.html>.

131. Lisa Schencker, *Uninsured Rate Drops Again in Illinois After Obamacare Takes Effect*, CHI. TRIBUNE (Sept. 13, 2016), <http://www.chicagotribune.com/business/ct-census-uninsured-obamacare-0914-biz-20160913-story.html>.

132. *Id.*

133. Indeed, the Premovics encountered this exact situation. See *supra* notes 1–12 and accompanying text.

134. *Barry*, 68 N.E.3d at 970–71.

135. *Id.*

136. Matthew Hertko, *Statutory Interpretation in Illinois: Abandoning the Plain Meaning Rule for an Extratextual Approach*, 2005 U. ILL. L. REV. 377, 379 (2005).

purpose.¹³⁷ Illinois courts' adherence to the plain meaning rule ignores the purpose of the Act. Using a method of statutory interpretation that focuses instead on both the statutory language and the expressed purpose of the statute would lead to results that benefit personal injury plaintiffs, instead of the current landscape which almost exclusively benefits health care lienholders.¹³⁸ The law as it stands drastically disincentivizes personal injury plaintiffs from bringing suit and when they do, their compensation is greatly reduced. This uneven playing field is the direct result of Illinois' refusal to require health care providers and professionals to bill plaintiff's health insurance.

B. Attorneys Fees and the Common Fund Doctrine

Plaintiffs attorneys have argued that the common fund doctrine should apply to health care providers and professionals holding liens under the Act.¹³⁹ The idea that these entities should contribute to attorneys fees finds support in some jurisdictions.¹⁴⁰ One of the main reasons behind requiring these entities to contribute to the common fund doctrine is to prevent unjust enrichment.¹⁴¹ The Alaska Supreme Court, in *Alaska Native Tribal Health Consortium*, reasoned that "it would be unfair to allow the [hospital] to collect on its health care provider lien without paying a pro rata share of attorney's fees when, without the common fund created by the plaintiff's lawyers, the [hospital] would have nothing upon which to enforce its lien."¹⁴² In essence, because the hospital was ready and willing to benefit from the common fund, in turn it must also pay a fair share of the expenses used to obtain the fund.¹⁴³ The Illinois Supreme Court in *Wendling*,

137. *Id.* at 384.

138. Using an approach like this would provide plaintiff-friendly results that the legislature intended when enacting the Act in 2003. For example, one of the major expressed reasons for enactment was the Illinois Supreme Court decision in *Burrell v. Southern Truss*, 679 N.E.2d 1230 (Ill. 1997). That decision allowed health care lienholders under the previous laws to completely subsume all of the plaintiff's recovery at trial, leading to the result of no compensation. Taking this background into account, the state of the law prior to enactment in 2003, the legislatures expressly avowed purpose behind the Act, and the language of the Act itself, surely a different decision could have been reached in the *Barry* case that would better comport with the purpose of the Act.

139. *Wendling v. S. Ill. Hosp. Servs.*, 950 N.E.2d 646 (Ill. 2011).

140. *Alaska Native Tribal Health Consortium v. Settlement Funds Held for or to Be Paid on Behalf of E.R. ex rel. Ridley*, 84 P.3d 418 (Alaska 2004); *Martinez v. St. Joseph Healthcare Sys.*, 871 P.2d 1363 (N.M. 1994).

141. *Alaska Native*, 84 P.3d at 434. Unjust enrichment occurs when a benefit is conferred upon a party, the party appreciated the benefit, and it would be inequitable for the receiving party to accept and retain the benefit without compensating the conferring party for the value of the benefit. *Id.* at 432.

142. *Id.*

143. *Id.*

by contrast, reasoned that because the hospital's claims were not contingent on the plaintiffs' rights against a third party, the hospitals were not unjustly enriched even though they did not contribute to the common fund.¹⁴⁴

The court in *Martinez*, albeit indirectly and writing nearly twenty years prior, addressed the underlying justifications for not applying the common fund doctrine.¹⁴⁵ It stated that the hospital's right to assert and enforce liens is dependent on obtaining a judgment or settlement.¹⁴⁶ The proceeds from the judgment or settlement operate as a fund and without the fund hospitals have nothing upon which to assert a lien under the Act.¹⁴⁷ When hospitals seek payment from the fund through the lien they directly receive the benefits of the work done by the plaintiff's attorney. Further, the hospitals benefit from the plaintiff's decision to bear the initial expenses and risks of litigation.¹⁴⁸

Attorney Ayla Ellison examined the relationship between the common fund doctrine and the Act, including proposed amendments.¹⁴⁹ Ellison applied the existing Illinois law of unjust enrichment to the Act and arrived at a conclusion more analogous to *Alaska* and *Martinez* than to the Illinois Supreme Court's decision in *Wendling*.¹⁵⁰ The Illinois Supreme Court has articulated the elements of unjust enrichment as follows: (1) the defendant unjustly retained a benefit (2) to the plaintiff's detriment, and (3) the defendant's retention of that benefit violates the fundamental principles of justice, equity, and good conscience.¹⁵¹ For claims involving the unjust enrichment of hospitals, the key contested element is what constitutes a "benefit." Illinois has recognized three general categories of benefits.¹⁵² The first category is "money had and received,"¹⁵³ which occurs when the defendant receives money owed to another plaintiff.¹⁵⁴ The second category occurs when the defendant has received services that were not paid

144. *Wendling*, 950 N.E.2d at 651.

145. *Martinez*, 871 P.2d at 1363.

146. *Id.* at 1366.

147. *Id.*

148. *Id.*

149. Ellison, *supra* note 110, at 326–28.

150. *Id.* at 320–26.

151. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989).

152. Ronald M. Lepinkas, *Unjust Enrichment Claims in Illinois: Applying a Venerable Doctrine to Modern Disputes*, 91 ILL. B.J. 514, 516 (2003).

153. *Board of Highway Comm'rs, Bloomington Twp. v. City of Bloomington*, 97 N.E. 280, 283 (Ill. 1911).

154. Ellison, *supra* note 110, at 322.

for.¹⁵⁵ The third category is “extinguishment of liability,” where a plaintiff pays a debt or prevents a financial loss for the defendant.¹⁵⁶

Each definition of benefit can be applied to the Act.¹⁵⁷ The first category applies because the hospital is receiving money owed to the plaintiff. Although the plaintiff owes a debt to the hospital, the judgment or settlement received by the plaintiff in the lawsuit is owed to the plaintiff, not the hospital.¹⁵⁸ The second category applies, as shown by jurisdictions that recognize the common fund doctrine applies to these relationships. The money is rightly owed to personal injury plaintiffs because the plaintiff expended funds to retain an attorney, and without the efforts of the plaintiff and attorney no fund would exist.¹⁵⁹ The third category also applies to the hospital-patient relationship as the hospital’s monetary recovery based on the attorney’s work prevents a financial loss for the hospital.¹⁶⁰ Thus, under the categories of benefits recognized by Illinois courts, a hospital is unjustly enriched under the Act regardless of whether a debt is owed to the hospital.¹⁶¹ The trial court in *Wendling* agreed with Ellison’s analysis and held that the common fund doctrine applied to the hospital-patient relationship.¹⁶² The *Wendling* trial court was true to the policy underlying the common fund doctrine in Illinois: prevention of freeloading.¹⁶³

Prevention of freeloading can be achieved by amending the Act to require hospitals to contribute to attorneys’ fees when the plaintiff’s attorney recovers a monetary award.¹⁶⁴ Jurisdictions that require hospitals to contribute to attorney fees use a pro rata share formula, which ensures hospitals only contribute an amount proportional to their recovery.¹⁶⁵ Any other equation could lead to the plaintiff being unjustly enriched as a result of the hospital paying more than its proportionate share.¹⁶⁶ The appellate court in *Wendling* frustrated the purpose of the Act, which was to encourage personal injury plaintiffs to bring suit. This amendment would allow for more substantial re-

155. *Hoban v. Strata Mktg., Inc.*, 1991 WL 206151, at *3 (N.D. Ill. Oct. 8, 1991).

156. Ellison, *supra* note 110, at 322.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 322–23.

162. Ellison, *supra* note 110, at 324.

163. *Brase v. Loempker*, 642 N.E.2d 202, 205 (Ill. App. Ct. 1994).

164. Ellison, *supra* note 110, at 327.

165. *Id.*

166. *Id.*

covery by personal injury plaintiffs, encouraging them to bring suit.¹⁶⁷ Accordingly, the Illinois legislature should strongly consider this amendment.

C. *Attorney's Fees and Costs, and the Judgment*

Personal injury plaintiffs have also argued that attorney's fees and costs should be deducted from the total settlement or judgment before any liens asserted under the Act are adjudicated.¹⁶⁸ Adopting this view would result in increased recovery for plaintiffs because it decreases the likelihood that a judgment would be completely subsumed by attorney's compensation and health care liens under the Act.¹⁶⁹

This argument is derived from the purported rationale behind the Act; ensuring plaintiffs are incentivized to bring lawsuits. Otherwise the total judgment could be reduced by seventy percent.¹⁷⁰ In *Stanton v. Rea*, the jury awarded the plaintiff \$13,506.80.¹⁷¹ First, the attorney's lien of thirty percent was deducted from the total judgment, reducing the amount to \$9,005.36.¹⁷² Next, forty percent was taken out pursuant to the Act for the hospital's liens, reducing the amount to \$3,602.96.¹⁷³ Since the cost to secure the judgment was \$4,501.44, "there was literally no money left for plaintiff."¹⁷⁴

The appellate court noted that the plaintiff receiving nothing from the judgment was not in line with the intent of the Act.¹⁷⁵ Thus, to ensure plaintiffs receive their thirty percent of the judgment as intended by the Act and the Attorneys Lien Act, the forty percent of

167. After all, if Ellison's framework were adopted, personal injury plaintiff's compensation would increase, as plaintiff's attorneys would be compensated in part by health care lienholders under the Act.

168. *Stanton v. Rea*, 978 N.E.2d 1146, 1149 (Ill. App. Ct. 2012).

169. Indeed, the plaintiff in *Stanton* had her entire judgment taken away after liens and attorney's fees were subtracted. *Id.* This was one of the main reasons the fifth district appellate court overruled the trial court and held that the attorney's fees were to be subtracted before liens are adjudicated. When the costs of obtaining judgments are high, allowing attorney's fees to be reduced before adjudication of liens can greatly increase a plaintiff's compensation, depending on the amount of costs.

170. *Id.* at 1150 ("The Act is clear that lienholders are limited to 40% of the judgment or settlement and that if they in fact receive 40% of the judgment or settlement, then any attorney's liens are limited to 30%. Accordingly, the Act specifically limits the liens upon a judgment or settlement to 70%.").

171. *Id.* at 1149.

172. *Id.* at 1150.

173. *Id.*

174. *Stanton*, 978 N.E.2d at 1151.

175. *Id.* ("However, because of the high costs it took to secure a judgment, there was literally no money left for plaintiff. . . . After a careful reading of the Act, we agree this was not the intention of our General Assembly.").

liens asserted by health care providers and professionals should not be computed until all attorney costs are deducted.¹⁷⁶

Continuing the trend of disfavoring personal injury plaintiff recovery, the Illinois Supreme Court in *McVey v. M.L.K. Enterprises, L.L.C.* overruled *Stanton*.¹⁷⁷ In doing so the court relied upon a strict reading of the Act.¹⁷⁸ The court noted that “every time the legislature sets forth a percentage limitation in [section 10 of the Act], it refers back to and requires the calculation be based on the ‘verdict, judgment, award, settlement or compromise’” with no qualifier.¹⁷⁹ Further, the court reasoned that a holding otherwise would have been inconsistent with the decision in *Wendling*.¹⁸⁰ The decisions in *McVey* and *Wendling* are especially troubling to prospective plaintiffs as the court has now approved of situations in which a plaintiff’s judgment can be completely subsumed by medical liens and attorney’s fees and costs.

Instead of being made whole, personal injury plaintiffs find themselves increasingly at risk for zero recovery, even though they should be protected from this adverse outcome.¹⁸¹ Furthermore, plaintiffs with Medicare or Medicaid coverage are potentially even more restricted in their recovery.

D. *The Impact of Medicare and Medicaid*

When the Act is applied to situations involving Medicare or Medicaid the results are inconsistent.¹⁸² In a 2016 decision an Illinois appellate court considered whether Medicare and Medicaid payments are included in the forty percent calculation under the Act.¹⁸³ In *McKim v. Southern Illinois Hospital Services*, the plaintiff reached a settlement with the tortfeasor for \$16,000.¹⁸⁴ The plaintiff had Medicare,

176. *Id.*

177. *McVey v. M.L.K. Enters., L.L.C.*, 32 N.E.3d 1112 (Ill. 2015).

178. *Id.* at 1115–16. *See also Wendling*, 950 N.E.2d 646; *Barry*, 68 N.E.3d 964.

179. *Id.* at 1116. The court here appears to be saying that since the legislature did not say the calculation should be based on *part of* a verdict, judgment, award, settlement or compromise, then it must be inferred that the legislature intended the calculation to be based on the whole verdict, judgment, award settlement or compromise.

180. *Id.* at 1117. “[P]laintiff, by seeing to have her attorney fees and costs subtracted from the total settlement prior to the calculation of the healthcare services lien, is asking us to improperly shift some of her attorney fees and litigation costs onto the hospital.” *Id.*

181. Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431, 432–33 (2009).

182. *Compare Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008), with *McKim v. S. Ill. Hosp. Servs.*, 61 N.E.3d 946 (Ill. App. Ct. 2016).

183. *McKim*, 61 N.E.3d at 950.

184. *Id.* at 948.

Medicaid, Medicare Part D, hospital, and ambulance liens against his settlement.¹⁸⁵ After adjudicating the liens, the plaintiff's thirty percent share was \$4,800.¹⁸⁶ On appeal, the court held that the Medicare, Medicare Part D, and Medicaid payments did not fall under the Act. Thus, according to the court, only the hospital and ambulance service amounts should have been included in the forty percent lien calculation for health care professionals and providers.¹⁸⁷ The court reasoned that by including these public agency payments, the trial court incorrectly found that these entities were health care professionals or health care providers for purposes of the Act.¹⁸⁸ This determination by the court reduced the plaintiff's recovery from \$4,800.00 to \$3,027.35.¹⁸⁹ The two lienholders that the court recognized under the Act were given increased recovery.¹⁹⁰ The court considered, and re-

185. *Id.* 948–49.

186. *Id.* It may be helpful to view the multiple lienholders as follows:

McKim (Plaintiff)	\$4,800.00
Attorney	\$4,800.00 plus \$494.93.00 in costs
Herrin Hospital	\$2,421.94 (gross bill of \$5,803.00; received \$2,812.94 share less \$391.00 in costs)
Williamson County Ambulance	\$643.81 (gross bill of \$1530.00; received \$747.74 share less \$103.93 in costs)
Medicare	\$158.30
Medicaid	\$221.41
Medicare Part D	\$2459.61

Id.

187. *Id.* at 950–51.

188. *McKim*, 61 N.E.3d at 950–51. “Medicare and Medicaid are public agencies and do not directly provide medical care to the patient. Instead, these agencies reimburse health care professionals and providers. We find that the statutory definitions of a ‘health care professional’ and a ‘health care provider’ are unambiguous.” *Id.*

189. *Id.* at 954. The court also reversed the trial court's grant of attorneys costs to be apportioned from the hospital and ambulance services, as the decisions in *Wendling v. Southern Illinois Hospital Services* and *McVey v. M.L.K. Enterprises, LLC* were directly contradictory to apportioning attorneys costs between lienholders. *Id.* at 953–54.

190. Again, a chart is helpful to see the new breakdowns in recoveries between the parties.

McKim (plaintiff)	\$3,027.35
Attorney	\$4,800.00
Health Care Services Lien Act Lienholders	\$5,333.33
Herrin Hospital	\$4,218.66
Williamson County Ambulance	\$1,114.67
Medicare	\$158.30
Medicaid	\$221.41
Medicare Part D	\$2459.61

Id. at 954.

jected, the plaintiff's argument that the 2013 Amendment to the Act barred the result.¹⁹¹

The result in *McKim* is anomalous to the goals of the Act and to recipients of Medicare and Medicaid. The recipients of Medicare and Medicaid are often the most vulnerable.¹⁹² By not including Medicare and Medicaid payments in the forty percent lien cap under the Act, Illinois courts have disregarded the needs of those that may need complete recovery the most.

Despite the fact that Medicare and Medicaid beneficiaries may have the most compelling case for being afforded complete recovery at the expense of the health care lienholder, the Illinois judiciary in *McKim* has created another barrier for similarly situated personal injury plaintiffs considering a lawsuit.

E. *Small Victories for Personal Injury Plaintiffs*

Not all judicial decisions have erected barriers to bringing suit for personal injury plaintiffs.¹⁹³ The biggest victory for plaintiffs came when the Illinois Supreme Court interpreted the "collateral source rule" in relation to discounts through Medicare and Medicaid payments.¹⁹⁴ The collateral source rule states that benefits received by the injured party from a source independent of the tortfeasor will not diminish damages otherwise recoverable from that tortfeasor.¹⁹⁵ These benefits do not reduce the defendant's tort liability even though they do reduce the plaintiff's loss.¹⁹⁶ Typically the collateral source

191. *Id.* at 951–52. The plaintiff argued that because the 2013 Amendment included subrogation into the Act, it followed that Medicare, Medicare Part D, and Medicaid claims would then fall under the Act as well. *McKim*, 61 N.E.3d at 951–52. The court struck back, stating "Even if we assumed that Medicare and Medicaid held subrogation interests, this section is preempted by the Medicare Secondary Payer Act and conflicts with the Public Aid Code, and it therefore does not apply in this case." *Id.* Indeed, the court found that the federal Medicare Secondary Payer Act preempted the Health Care Services Lien Act. *Id.* at 951. "Interpreting the Health Care Services Lien Act to include Medicare and Medicare Part D bills within the statutory 40% limit creates a conflict between that act and the Medicare Secondary Payer Act. Therefore, the federal statute preempts the state statute. *Id.*

192. Jacobson et. al, *Income and Assets of Medicare Beneficiaries, 2014-2030*, KAISER FAMILY FOUNDATION (Sept. 10, 2015), <http://kff.org/medicare/issue-brief/income-and-assets-of-medicare-beneficiaries-2014-2030/>.

193. These victories, for the most part, are unlikely to occur often enough, and contain large enough sums of money, to make a difference in deciding whether to bring suit against a tortfeasor.

194. *See Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008).

195. *Arthur v. Catour*, 833 N.E.2d 847, 851 (Ill. 2005).

196. *Id.*

will have a lien or subrogation right to prevent such a double recovery.¹⁹⁷

In *Wills v. Foster*, the plaintiff sustained medical bills totaling \$80,163.47 arising out of an automobile accident.¹⁹⁸ After Medicare and Medicaid discounts were applied, the medical bills were reduced to \$19,005.50.¹⁹⁹ This amount was then paid by Medicare and Medicaid on the plaintiff's behalf.²⁰⁰ The plaintiff moved to prevent the defendant from introducing evidence that the medical bills were discounted and paid for by Medicare and Medicaid. The defendant moved to limit evidence to only the *paid* amount of the bills, \$19,005.50.²⁰¹ The Illinois Supreme Court held that a plaintiff is entitled to recover the full billed medical expenses, regardless of whether they were paid or discounted by private insurance or covered by a government program.²⁰² Therefore, the plaintiff need only establish the reasonableness of the medical bills in order to place the entire amount of those bills into evidence.²⁰³ The *Wills* decision allows for personal injury plaintiffs to present evidence of the full, non-discounted amount of their medical bills to the court.²⁰⁴

While *Wills* seems to increase potential recovery under the Act, this possibility is tempered by *McKim*. Under the collateral source rule plaintiffs are entitled to recover the full billed medical expenses incurred. However, in the event that health care liens are adjudicated by the court under the Act, those public program payments are excluded under *McKim*.²⁰⁵ In other words, plaintiffs cannot include expenses incurred through public programs in the "pool" of money existing for health care providers and professionals.²⁰⁶ Thus, health

197. *Wills*, 892 N.E.2d at 1022. The notion of a double recovery stems from the fact that the plaintiff, receiving compensation from a third-party source, might also receive that same amount from the tortfeasor through a judgment. The double recovery does not occur because a lien or subrogation right for the "doubled" amounts is placed against the plaintiff.

198. *Id.* at 1020.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1030.

203. *Wills*, 892 N.E.2d at 1031.

204. See Ben Bridges, *Clarifying 'King Arthur's Court: Making Sense of the Collateral Source rule in Illinois After Wills v. Foster*, 34 S. ILL. U. L.J. 747 (2010) (providing a comprehensive analysis of the collateral source rule in Illinois, including the impact of *Wills v. Foster*).

205. The action in *McKim* was an adjudication of liens under the Act. *McKim*, 61 N.E.3d at 946. At issue in *Wills* was whether or not under the collateral source rule the plaintiff was excluded from introducing into evidence the entire billed amount of expenses, regardless of whether they had been paid by a third-party. *Wills*, 892 N.E.2d at 1020.

206. See 770 ILL. COMP STAT. 23/10 (2016).

care providers and professionals recover more because there are fewer entities to divide a pro-rata share of the plaintiff's judgment.²⁰⁷

F. Guaranteed Recovery and Possible Violations of HMO Act

Instead of using liens as protection for treating insolvent and uninsured patients, hospitals are using them to maximize profits. The primary vehicle for doing so is a veil of secrecy—the chargemaster rates. Specifically, personal injury plaintiffs have an increasingly difficult time rebutting and establishing charges were unreasonable. The outcome is that those paying for insurance may be paying for nothing and those uninsured will likely not be made whole due to the inflated and arbitrary chargemaster rates.²⁰⁸

Hospitals and healthcare professionals assert liens under the Act because it allows them to charge and collect inflated rates for services. However, this guaranteed recovery of the statutorily defined amount in the Act was not what the Illinois House of Representatives expected when debating the passage of the Act.²⁰⁹ Additionally, the Illinois HMO Act provides a statutory rebuttal to the strict reading of the Health Care Services Lien Act.²¹⁰ Under the HMO Act, an “organization” is defined as:

any insurance company, a nonprofit corporation authorized under the Dental Service Plan Act or the Voluntary Health Services Plans Act, or a corporation organized under the laws of this or another state for the purpose of operating one or more health care plans and doing no business other than that of a Health Maintenance Organization or an insurance company.²¹¹

The definition of an organization under the HMO Act decidedly helps those personal injury plaintiffs that argue hospitals should bill their insurance companies before asserting liens under the Health Care Services Lien Act.²¹² The HMO Act further defines “provider” as “any physician, hospital facility, facility licensed under the Nursing Home Care Act, or other person which is licensed or otherwise authorized to furnish health care services and also includes any other entity that ar-

207. *Id.*

208. Beard & Marsh, *supra* note 30, at 284.

209. H.R., Transcript of Debates, 93rd Gen. Assemb., Reg. Sess., at 39 (Ill. May 27, 2003). “[M]ost health care providers don’t actually file a lien. . .if they believe that their patient or patients might be able to pay this. They file the liens in the cases where. . .there is. . . a lawsuit and they probably will not get paid.” *Id.*

210. See 215 ILL. COMP. STAT. 125 (2016).

211. 215 ILL. COMP. STAT. 125/1-2(11) (2016).

212. See Overlay, *supra* note 5. This situation is not unlike the Premovics’, in which they argued that NorthShore University HealthSystem was required to bill their insurance company, Blue Cross and Blue Shield of Illinois. *Id.*

ranges for the delivery or furnishing of health care service.”²¹³ This definition fits within the definitions of hospitals and health care professionals under the Health Care Services Lien Act.²¹⁴

The HMO Act requires the contracts between organizations and providers contain a hold-harmless clause.²¹⁵ The effect of this language is such that personal injury plaintiffs who are enrolled in a health care plan with the organization are “enrollees” under this section. In turn, enrollees are protected by the language of the section that states that the provider, who is the hospital or health care professional, cannot seek any type of payment or have any recourse against the plaintiff for services covered by the insurance organization (except for co-payments and deductibles).²¹⁶ Further, the section also states that “[t]he organization’s enrollees, the persons acting on the enrollee’s behalf (other than the organization) and the employer or group contract holder *shall be third party beneficiaries of this clause.*”²¹⁷ This language explicitly appears to rebut Illinois courts’ contentions that personal injury plaintiffs are not the intended third-party beneficiaries of the contracts between health insurance organizations and providers. An Illinois court has yet to issue an opinion on the validity of 215 ILCS 125/2-8(a) (2016) as it applies to the Health Care Services Lien Act.²¹⁸

213. 215 ILL. COMP. STAT.125/1-2(12) (2016).

214. See Overley, *supra* note 5. Likewise, NorthShore University HealthSystem is a hospital facility, and any physicians employed there through independent contractors, would all be considered “providers” as under HMO.

215. The hold-harmless clause is as follows:

The provider agrees that in no event, . . . shall the hospital provider or its assignees or subcontractors have a right to seek any type of payment from, bill, charge, collect a deposit from, or have any recourse against, the enrollee, persons acting on the enrollee’s behalf (other than the organization), the employer or group contract holder for services provided pursuant to this contract except for the payment of applicable co-payments or deductibles for services covered by the organization or fees for services not covered by the organization. . . The organization’s enrollees, the persons acting on the enrollee’s behalf (other than the organization) and the employer or group contract holder shall be third party beneficiaries of this clause. This clause supersedes any oral or written agreement now existing or hereafter entered into between the provider and the enrollee, persons acting on the enrollee’s behalf (other than the organization) and the employer or group contract holder. . .

215 ILL. COMP. STAT. 125/2-8(a) (2016).

216. *Id.*

217. *Id.* (emphasis added).

218. There is at least one class action complaint filed that includes a violation of the HMO as a cause of action. Complaint, Sirkorsky v. Edward Hosp., 2015 WL 738174 (Ill. Cir. Ct.) (No. 2015-L-000131). The complaint was filed February 11, 2015. The complaint alleged that the defendant hospital violated the language of 215 ILL. COMP. STAT. 125/2-8a by asserting a lien on the proceeds of the plaintiffs’ lawsuit against the third-party tortfeasor. A review of the online case docket shows the case was dismissed with prejudice on December 17, 2015.

However, an Illinois appellate court has addressed the validity of the Hospital Lien Act with regard to the HMO Act.²¹⁹ In *Richmond ex rel. Richmond v. Caban*, the plaintiffs (a father and minor daughter) sustained \$24,238.00 in medical expenses following an automobile accident.²²⁰ The plaintiffs were covered by a Blue Cross/HMO Illinois health insurance plan.²²¹ Upon arriving at the hospital for treatment the plaintiffs signed a “hospital agreement” prepared by the plaintiffs’ insurance policy administrator that set forth the procedures that the hospital could seek reimbursement for covered medical expenses when the policyholder was injured by a third party.²²² The plaintiffs later sued and eventually settled for \$50,000.00; afterwards the hospitals filed liens under the Hospital Lien Act for the services rendered.²²³

While the court recognized that the hospital agreement did not require the hospital to bill the policy administrator,²²⁴ the court concluded that section 2-8(a) of the HMO Act barred any claims for recourse against the plaintiffs, except for the two exceptions listed in the HMO Act itself.²²⁵ Thus, the hold-harmless clause of the HMO Act invalidates a hospital lien unless the lien is filed pursuant to the exceptions listed in the act.²²⁶ The court largely based its conclusions on canons of statutory interpretation.²²⁷

Richmond occupies a peculiar place in Illinois case law. It has never been outright overruled; in fact, it has barely been cited since decided in 2001. While the case did concern the Hospital Lien Act, the predecessor of the Health Care Services Lien Act, the implications of the holding remain the same.²²⁸ The holding in *Richmond* should be read to establish that the HMO Act invalidates hospital liens filed under

219. *Richmond ex rel. Richmond v. Caban*, 754 N.E.2d 871 (Ill. App. Ct. 2001).

220. *Id.* at 872.

221. *Id.*

222. *Id.* at 872–73.

223. *Id.* at 873.

224. *Id.* at 875.

225. *Richmond*, 754 N.E.2d at 876. The two exceptions allow recourse for (1) applicable co-payments or deductibles for the medical services covered by the plaintiff’s policy and (2) fees for services not covered by the policy. *Id.* See also 215 ILL. COMP. STAT.125/2-8(a).

226. *Richmond*, 754 N.E.2d at 876.

227. *Id.* at 875. The court mentioned when two statutes allegedly conflict, courts have a duty to construe the statutes to avoid inconsistency and give effect to both statutes, if reasonably possible. *Id.* The court further rejected the contention that the hold-harmless clause would invalidate all hospital liens, arguing instead that the relevant sections of the hospital lien act and the HMO act could be construed to give effect to both without any inconsistencies. *Id.*

228. The Health Care Services Lien Act differs from its predecessors in only one significant respect, that being the statutory caps and proportioning schemes, the basic analysis would appear to prevail.

the Health Care Services Lien Act, absent the existence of the specific exceptions outlined in the HMO Act.

While *Richmond* has not been followed in Illinois, other jurisdictions agree with its reasoning.²²⁹ These jurisdictions have attacked not only the agreements between insurers and providers, but also specific hold-harmless language, just as the court in *Richmond* did.²³⁰ In *Parnell v. Adventist Health System/West* the plaintiff was injured by a third-party tortfeasor and received treatment at a hospital.²³¹ The hospital had a provider agreement with the plaintiff's insurer to provide discounts on medical care.²³² The hospital agreed to accept "as payment in full" the amount set forth in the agreement.²³³ After rendering treatment to the plaintiff the hospital, in accordance with the provider agreement, was reimbursed by the plaintiff's insurer.²³⁴ However, the hospital later asserted a lien under the state's statutory lien act seeking to recoup the difference between the amount of services it billed versus the discounted amount it received under the provider agreement.²³⁵ The court held California's lien statute required the existence of an underlying debt in order for the lien to attach.²³⁶ Accordingly, since the plaintiff's debt had been extinguished when the hospital accepted payment from the insurer, the subsequent lien could not attach.²³⁷

While the *Richmond* decision is one of the only cases to cite to and analyze the HMO Act and health care liens, Illinois appellate courts are split on the issues *Parnell* addressed. The court in *Parnell* noted that only one case squarely supported the defendant hospital's inter-

229. See *Dorr v. Sacred Heart Hosp.*, 597 N.W.2d 462 (Wis. Ct. App. 1999); *Parnell v. Adventist Health Sys./W.*, 109 P.3d 69 (Cal. 2005).

230. See *Dorr*, 597 N.W.2d at 472. In *Dorr*, the defendant hospital did not bill plaintiff's insurance after a car accident, but instead filed a lien under the state's lien act. *Id.* at 467-68. The court of appeals of Wisconsin ruled that, because the provider agreement between the plaintiff's insurance company and the hospital stated that the hospital would accept a certain reimbursement rate for services, the hospital waived any right to pursue the policyholder for services covered by the provider agreement. *Id.* at 471-72. The court also found that the provider agreement operated as a payment in full provision, and in doing so, it followed that there was no underlying debt to support the asserted lien. *Id.* at 472. The hold-harmless agreement was designed specifically for the purpose of protecting the insurance policy subscribers (here, the plaintiff). *Id.* at 475. In spite of the express disclaimer of any third party beneficiaries to the contract, the court ruled that the plaintiff was a third party beneficiary to the provider agreement. *Id.* at 475-76.

231. *Parnell*, 109 P.3d at 71.

232. *Id.*

233. *Id.* at 71-72.

234. *Id.* at 72.

235. *Id.*

236. *Parnell*, 109 P.3d at 73.

237. *Id.* at 79.

pretation of their state lien act: *Rogalla v. Christie Clinic, P.C.*²³⁸ In *Rogalla*, an Illinois appellate court considered whether the plaintiff stated a cause of action as a third-party beneficiary of a medical services agreement contract between the defendant health clinic and plaintiff's health insurance company.²³⁹ The plaintiff argued the defendant could not attach a lien on the judgment because of the hold-harmless clause in the medical services agreement.²⁴⁰ Plaintiff further argued, citing to *Richmond*, that there is no debt for a lien to attach because the debt was extinguished by the hold-harmless clause.²⁴¹ The court held that the hold-harmless provision in the medical services agreement did not limit the defendant's ability to seek a lien only to the amounts the defendant could obtain from the plaintiff HMO member.²⁴² The court then noted that the Physicians Lien Act "is not an action against plaintiff and does not violate the hold-harmless provision of the Agreement."²⁴³ In doing so, the court rejected the reasoning in *Richmond*.²⁴⁴

Further confusing matters, in *Lopez v. Morley*, another Illinois appellate court expressly rejected *Rogalla*.²⁴⁵ The plaintiff was treated by the defendant hospital after sustaining injuries in an automobile accident.²⁴⁶ Plaintiff's health insurance company had a contract with the defendant that said the defendant would accept less than the reasonable value of service rendered to plaintiff for payment.²⁴⁷ Further, the amount paid by plaintiff's health insurance to defendant would be considered payment in full.²⁴⁸ After the plaintiff settled her lawsuit with the tortfeasor for \$120,000.00, the defendant hospital maintained it held a valid lien for the difference between what was charged to the plaintiff and what was provided as payment in full from plaintiff's health insurance company.²⁴⁹ The court was not persuaded.²⁵⁰ In ref-

238. *Id.*

239. *Rogalla v. Christie Clinic, P.C.*, 794 N.E.2d 384, 387 (Ill. App. Ct. 2003). The medical services agreement was a "capitation" contract. *Id.* According to the agreement, the defendant would seek no payment from the plaintiff organizations HMO members other than copayments and deductibles. *Id.* The court went on to note that the distinction between a medical services agreement and an HMO agreement is "not important." *Id.* at 392.

240. *Id.* at 389.

241. *Id.*

242. *Rogalla*, 794 N.E.2d at 389.

243. *Id.* at 392.

244. *Id.* at 391.

245. *Lopez v. Morley*, 817 N.E.2d 592, 599 (Ill. App. Ct. 2004).

246. *Id.* at 594. The plaintiff was charged \$33,753.27 for her treatment. *Id.*

247. *Id.* at 598.

248. *Id.* As a result, the defendant received \$4,900.00 as payment in full for plaintiff's treatment.

249. *Id.*

erence to *Rogalla*, the court noted that its decision in *N.C. ex rel. L.C. v. A.W. ex rel. R.W.* was read too broadly; instead, the court held it stood for the more narrow proposition that contracts will be given their effects.²⁵¹ Therefore, because the defendant-appellant did not produce the contract between the health insurance company and the defendant hospital, the court held that the trial court properly ruled the payment-in-full clause extinguished all debts.²⁵²

Lopez v. Morley rejects all arguments in favor of hospitals asserting liens after accepting payments in full for their services. The *Lopez* court noted that its decision does not allow injured parties to recover more than was actually paid to hospitals,²⁵³ a “windfall,” but is rather simply an application of the collateral source rule.²⁵⁴

The decision still allows the lessening of financial burdens on hospitals because hospitals can enter into contracts to retain their right to recover through hospital liens.²⁵⁵ However, this policy does not relieve hospitals of contractual obligations they later regret.²⁵⁶ While *Lopez* did not deal directly with the Health Care Services Lien Act, its analysis and reasoning should apply. The holding in *Lopez* prohibits hospitals from asserting liens under the Act after entering into HMO provider agreements that contain a hold-harmless clause.²⁵⁷ One way hospitals could comply with the HMO Act and retain their rights to assert liens under the Act would be to explicitly provide for that right in the contract. This is entirely consistent with the *Lopez* assertion that the court was simply giving effect to the written contracts between the parties.

Even though *Lopez* applied to the Physician’s Lien Act, this should not temper its applicability. *Lopez*, by exhibiting a willingness to invalidate liens, should give plaintiffs hope that Illinois courts may soon

250. The court analyzed its prior decisions in *Richmond ex rel. Richmond v. Caban* as well as *N.C. ex rel. L.C. v. A.W. ex rel. R.W. Lopez*, 817 N.E.2d at 595–99.

251. *Id.* In *N.C.*, the court held that the health providers contact with the insurance company extinguished all debts once the payment in full was received. Therefore, no lien could attach on the plaintiff’s action because there was no debt left for the lien to satisfy. *Id.* at 595.

252. *Id.* at 599. Interestingly, the Illinois Trial Lawyers Association filed an *amicus curiae* brief on behalf of the plaintiff. *Id.* at 594. This reinforces the long-standing tradition of the battle between plaintiff’s lawyers and defendant hospitals with health care liens and their application.

253. This contention arises from the fact that, during settlement negotiations, the plaintiff represented to the defendant tortfeasor that the medical bills were for the total billed amount of \$33,753.27, and not the \$4,900.00 that was accepted as payment in full by the defendant hospital. *Id.* at 594.

254. *Lopez*, 817 N.E.2d. at 599.

255. *Id.*

256. *Id.*

257. 215 ILL. COMP. STAT. 125/2-8 (2016).

reconsider their interpretation of the Act. If citizens are required to purchase health insurance, and if that plan is an HMO, then that insurance provider must comply with the Illinois HMO Act when entering into provider contracts with hospitals.²⁵⁸ If the hospital does not retain its right to assert a lien under the Health Care Services Lien Act, then the contract must be carried out, and the hospital will not have the ability to assert any liens. However, the current law in Illinois regarding the Health Care Services Lien Act and the HMO Act does not effectuate parties' intent under their contracts, but rather imposes a monumental barrier to plaintiffs bringing personal injury suits.

IV. IMPACT

Part V begins by noting the factors independent of the Act that operate as barriers to plaintiffs bringing suit. Part V then discusses the provision in the Act that enables medical providers and professionals to initiate suit even after fulfillment of a lien. Part V concludes that plaintiffs face overwhelming obstacles and in this context rarely find justice.

A. *The Barriers to Bringing Lawsuits*

Any discussion regarding barriers must begin with the unique way parties pay to bring and execute lawsuits in the United States. In the United States, unless otherwise provided for by statute or contract, each party to a lawsuit pays their own fees.²⁵⁹ Plaintiffs contemplating whether or not to bring suit must weigh their personal risk against the potential reward.²⁶⁰ Aside from attorneys fees that are deducted from the judgment or settlement, plaintiffs incur significant costs during the

258. 215 ILL. COMP. STAT. 125/2-8 (2016).

259. John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993). Conversely, the English Rule allows for fee-shifting, such that the "loser" of the lawsuit pays for the opposing party's fees. *Id.* For a comprehensive analysis of the American Rule and its origins, see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW AND CONTEMPORARY PROBLEMS 9 (1984).

260. *Id.* at 1594.

litigation process.²⁶¹ For example, the median automobile personal injury case costs \$43,000.00.²⁶²

Personal injury plaintiffs also face yet another barrier in the Act's provision that allows for lawsuits to be brought against the plaintiff for amounts not recovered after satisfaction of the medical lien.²⁶³ This section of the Act can operate as a final blow to plaintiffs after they receive their judgment or settlement. Plaintiffs may believe, after all liens have been satisfied and they receive their final settlement or judgment check, that the matter is closed. However, this section of the Act provides that the matter may not be resolved until years after the trial ends.²⁶⁴ Given the often inflated "reasonable charges" that hospitals use, any lien that cannot be negotiated to a final amount with the medical provider is subject to further action under the Act.²⁶⁵

B. Proposed Solutions

The Illinois Legislature does not need to go through the exhaustive amendment process to reduce burdens on personal injury plaintiffs.²⁶⁶ One key solution already exists in the HMO Act.²⁶⁷ Adherence to the HMO Act in instances where appropriate gives all parties—personal injury plaintiffs, insurance companies, and hospitals—the benefits of their bargain.²⁶⁸ Applying the HMO Act removes a substantial barrier from plaintiffs bringing suit and works towards making them whole again.²⁶⁹

261. Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 COURT STATISTICS PROJECT, no. 1, Jan. 2013, available at http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx. Litigation tasks can be generally categorized as follows: Case Initiation, Discovery, Settlement, Pretrial Motions, Trial, and Post-Disposition. *Id.* at 2.

262. *Id.* at 7. To compare, automobile personal injury costs are at the lower end of the spectrum. Premises liability, real property, employment, contract, and malpractice cases are all costlier. *Id.*

263. 770 ILL. COMP. STAT. 23/45 (2003). The section provides, in full:

Nothing in this Act shall be construed as limiting the right of a health care professional or health care provider, or attorney, to pursue collection, through all available means, of its reasonable charges for the services it furnishes to an injured person. Notwithstanding any other provision of law, a lien holder may seek payment of the amount of its reasonable charges that remain not paid after the satisfaction of its lien under this Act.

264. *Id.*

265. 770 ILL. COMP. STAT. 23/45 (2003).

266. State Universities Retirement Systems of Illinois, *How a Bill Becomes a Law in Illinois* (May 14, 2012), available at http://www.surs.org/pdfs/legal/How_a_Bill_Becomes_a_Law.pdf.

267. See 215 ILL. COMP. STAT. 125 (2016).

268. See *supra* notes 220–28 and accompanying text.

269. Molot, *supra* note 12, at 63.

Additionally, all of the above analyzed doctrines, which have almost all been resolved in favor of hospitals and health care providers, should be revisited with personal injury plaintiffs in mind. While any one doctrine favoring hospitals over personal injury plaintiffs may seem small, in the aggregate plaintiffs suffer greatly. Review of these doctrines is necessary to promote fair outcomes in personal injury lawsuits.²⁷⁰

What is not advocated for is a scheme in which hospitals and health care providers are not adequately compensated for their services. Instead, given the institutional advantages these entities enjoy, namely the chargemaster system and overall wealth profile, a more just and fair system exists where personal injury plaintiffs receive more compensation. The current landscape enables these entities to charge inflated rates and recover on those rates despite valid legal and policy grounds militating otherwise.

V. CONCLUSION

The Illinois Health Care Services Lien Act provides a guaranteed avenue of recovery for health care providers and professionals.²⁷¹ This is not an undesirable outcome necessarily, as health care providers would be reluctant to provide care for injured persons that are unlikely to pay.²⁷² However, the Act has been interpreted by courts at the expense of personal injury plaintiffs such that the end result is a decreased recovery for those who suffered physical injuries. Despite the purported justification for the Act plaintiffs are in fact disincentivized from bringing suit. Personal injury plaintiffs in Illinois, like the Premovics, find support in other states challenging the practices of medical providers in personal injury cases.²⁷³

270. Although, again, the outlook for change is not optimistic. The process to pass legislation is lengthy and tiresome. The process to overrule judicial decisions requires the perfect storm of factors: a case must arise with the precise issue at stake, the court must hear the case, and the deciding justices must articulate some reason to ignore the command of *stare decisis*. Of course, the judicial process is moot if legislation is passed addressing and overruling the judicial decisions.

271. 770 ILL. COMP. STAT. 23 (2003).

272. Alex Schulte, *Healthcare Liens and the Common Fund Doctrine: The Need for Legislative Action to Prevent Fee Shifting at the Expense of Healthcare Providers*, 98 IOWA L. REV. 1763, 1768 (2012) (“The prevailing policy objective behind state healthcare lien statutes is to enable healthcare providers to secure some compensation for their treatment of uninsured or underinsured individuals.”).

273. See Marci Manley, *Fox16 Investigates: Arkansas Teacher Sues Hospital Over Billing Practices*, FOX NEWS, <http://www.fox16.com/news/local-news/fox16-investigates-arkansas-teacher-sues-hospital-over-billing-practices/299573621>; Thomas Bailey Jr., *Mean liens? Regional One Health, attorneys disagree on lawsuit's impact*, COMMERCIAL APPEAL (Jan. 16, 2015), <http://archive.commercialappeal.com/news/mean-liens-regional-one-health-attorneys-disagree-on-law>

The Illinois Legislature should respond to these outcomes by amending the Act to provide further relief for those most in need—personal injury plaintiffs.²⁷⁴ In fact, the legislature need not even amend the Act for this process to begin, as the HMO Act may provide the avenue for increased compensation for personal injury plaintiffs.²⁷⁵ At a time where having insurance is mandated,²⁷⁶ personal injury plaintiffs deserve a bigger slice of the pie.

Zachary Reynolds

suits-impact-ep-880979877-324487421.html; Steve Everly, *St. Luke's Hospital Settles Health Insurance Cases with Accident Victims*, KANSAS CITY STAR (Apr. 25, 2014), <http://www.kansas-city.com/news/business/article346893/St-Luke%E2%80%99s-Hospital-settles-health-insurance-cases-with-accident-victims.html>.

274. Such legislation could involve interpretations and applications of the Common Fund Doctrine, subrogation (to a clearer extent than the 2013 amendment to the Act), Medicare, Medicaid, and the HMO Act. Involving each of these doctrines would require health care providers and professionals to bill plaintiff's health insurance, with the resulting lien amounts for the discounted rates. However, the legislature decides to apply the common fund doctrine would clarify any fee-shifting requirements. The only remaining liens to be settled and negotiated would be any subrogation liens.

275. 215 ILL. COMP. STAT. 125/2-8(a) (2016). In situations where the HMO Act applies, medical providers, insurance companies, and personal injury plaintiffs would all get their respective benefits bargained for.

276. *See Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010).