LIENS AND REIMBURSEMENT

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DISCLAIMER:

Let me start by saying I'm an Idaho-licensed attorney.

And what do attorneys do?

They cause problems. How do they do this? By asking a lot of questions.

Well, I'm going to be presenting a lot of information today; and I'm going to be asking a lot of questions.

Some of the questions I ask about the laws that control what we do - and about the practices we've all employed – are going to sound bizarre and extreme.

Why? Because we've become comfortable doing things a certain way;

And my job today is not only to share information, but to make you think just a little outside your comfort zones.

So, first, let me say that I am not offering you legal advice today. I'm just the messenger of love and statutory opinion. Before you act on anything I offer you today, please consult with your attorneys and commissioners and elected clerks.

Keep in mind that when somebody writes legislation, it is never believed by the authors that they have covered every possible scenario. And the indigency statutes have been tinkered with and amended probably more than any other law in this state's history.

OK – Final disclaimer - I may work for Ada County but whatever I say today is only my opinion and not the opinion of Ada County, my commissioners or any employee thereof.

WHAT WE WILL COVER TODAY

1. Legal definition of a lien
2. Types of legal liens
3. When is a lien created?
4. When does a lien attach?
5. What does it mean to "perfect" a lien and why is that important?
6. The difference between liens and reimbursement
7. What is the value of our liens?
8. What property does our lien attach to?
9. What counties can do to improve their chances of collecting reimbursement?
10. How to deal with divorces and "married-but-separated" applicants
11. Types of actions on liens
    i. Full release of liens
    ii. Partial release of liens
    iii. Subordination of liens
    iv. Consensual liens
12. What happens to our lien after bankruptcy?
13. Filing liens in other counties
14. Filing liens in other states

Counties began filing medical indigency liens in 1996 following amendments to the statute that would permit this.

LEGAL DEFINITION OF A LIEN

As an attorney I am often reminded that not everybody speaks the lingo of lawyers and I think lawyers sometime forget that.

I also believe that it's more important for people to understand context and concepts in order for them to have a greater understanding of content. That's another way of saying that knowledge without understanding is useless.

So, I'd like to spend a little time explaining the context and concept of exactly what a lien is before we get too much into content. Then, I think everything else will be easier to understand.

The etymological root of the word "lien" is based in Anglo-French and Latin words that mean "to bind".

In law, a lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. The lien is designed to bind the property to the debt.

Idaho Code 45-101 defines a lien this way:

> *A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act.*

And 45-111 says:

> *The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security.*

This makes it very clear that the lien and the debt are two separate things. That is interesting language. This will be important later when we talk about the value of our liens.

Idaho law says that all liens fall into one of two categories: General liens or Special liens.

General liens are liens to secure performance of multiple or a class of obligations.

Special liens are to secure performance of a particular or specific act. Our liens would be classified as special liens.

TYPES OF LIENS

Now - Liens come in many shapes and sizes:

- **Materialman's Liens** –

    - For example: Somebody who sells you fencing material for your house and delivers it there, has the right to file a lien against your house if you don't pay your bill.

    - This even extends beyond you. For example, if you hire Larry to remodel your kitchen and Larry has Home Depot deliver a bunch of lumber to your house for the job, if Larry doesn't pay Home Depot, Home Depot can file a lien against your home until they get paid.

- **Mechanic's Liens** –

    A mechanic's lien is used interchangeably with the term "materialman's" lien. In some states they both exist: and in some states they mean the same thing so only one such lien exists.

    - This is where somebody comes to your house and performs work under an agreement for payment. A contractor, for example, might agree to remodel your kitchen, do some landscaping, install a hot water heater, build a closet, fix a leaky faucet, or just mow your lawn.

- If you don't pay the bill, they can file a lien against your property where they performed the work.

Interestingly, in Idaho materialman and mechanic liens are only good for 6 months unless the lienholder files a civil court action to collect on the debt.

- **Mortgages** – A mortgage is just a fancy word for a lien. When you finance a house, the bank holds the mortgage until it's paid in full. That is, they have a lien on your home.

- **Auto Financing** – Any time you finance a car, the bank holds the title until it's paid in full because that is their form of a lien against the property which is the car.

    - For cars and other things, it's actually called a "security interest", but it's still a lien.

- **Home Owners Associations** - can even file liens against your home if you don't pay your HOA dues.

- **Judgment Lien** - If you take somebody to court because they owe you money and you secure a judgment, all you have to do is file that judgment with the recorder and you now have a valid lien against their property for the value of the judgment.

- **Attorney Liens** - If an attorney does work for you and you pay them, they can file an attorney's lien against your property and likely against your bank account.

- **Tax liens** - are another well-known form of liens.

- **Pawn Shops** – and of course pawn shops are the perfect illustration of how liens work by the use of possessory liens: "I will take possession of a piece of

your property and I will hold it until you repay the loan. If you don't repay as agreed, I own it."

And there are other forms of liens we won't spend time discussing like Hospital or Medical Liens that don't apply to us.

Lien law is a very complicated part of the law and many business transactions are governed by special lien laws. All lawyers are painfully aware of Title 9 secured transactions. Very complex and confusing.

QUESTIONS?

WHEN IS A LIEN CREATED, WHEN DOES IT ATTACH, AND WHAT DOES IT MEAN TO PERFECT A LIEN?

In lien law, there are 4 basic concepts to remember:

1. Creation of the lien
2. Attachment of the lien
3. Perfection of the lien
4. Execution of the lien (which we won't spend time talking about)

So, let's quickly discuss the first 3 elements:

CREATION OF THE LIEN

This generally refers to a law that creates the lien or the right to a lien. For example, the statute might say that if a contractor performs work for another person at their home for which the owner has agreed to pay for and fails to make payment as agreed, the contractor is entitled to secure the debt through a lien against that property.

Up to this point, the law has only CREATED the right to a lien. Nothing else.

ATTACHMENT OF THE LIEN

Attachment generally answers the question: WHEN DOES THE LIEN BECOME ACTIVE? What has to happen to actually activate the lien?

This is usually some event that happens that triggers the attachment.

The law says Bob has a "right" to a lien, but until he does some work for you or until the debt has been created, there is no lien.

– When Bob performs work on your house and the debt becomes due, this is WHEN the lien attaches – or gains significance.

In our case, the legislature combined the CREATION and the ATTACHMENT of the lien all in one breath.

If you look at 31-3504 – you see this language:

> "Upon application for financial assistance pursuant to this chapter an **automatic lien shall attach** to all real and personal property of the applicant and on insurance benefits to which the applicant may become entitled."
>
> "The lien shall also attach to any additional resources to which it may legally attach not covered in this section."

Then, a little farther down you read:

> "The lien **CREATED** by this section may be, in the discretion of the county commissioners and the board, perfected..."

So, for us, there's really no distinction between the creation and attachment of the lien because they are both created by the same event: filing of an application.

Our liens are created AND they attach as soon as an application is filed.

PERFECTION OF THE LIEN

The third element of lien law is PERFECTION of the lien.

Our statute refers to perfection twice:

First - Real Property

> "The lien created by this section may be, in the discretion of the county commissioners and the board, **perfected** as to real property and fixtures by recording a document entitled: notice of lien and

application for financial assistance, in any county recorder's office in this state in which the applicant and obligated person own property.

The notice of lien and application for financial assistance shall be recorded as provided herein within thirty (30) days from receipt of an application, and such lien, if so recorded, shall have a priority date as of the date the necessary medical services were provided."

Second - Personal Property

"The lien created by this section may also be, in the discretion of the county commissioners and the board, perfected as to personal property by filing with the secretary of state within thirty (30) days of receipt of an application, a notice of application..."

Remember that the lien you file with the recorder's office only applies to real property. It does NOT cover money, insurance benefits, bank accounts or anything else. Just real property.

So, be sure you're filing your personal property liens with the Secretary of State to cover all of the applicant's property in addition to the real property.

WHAT DOES IT MEAN WHEN A LIEN IS PERFECTED?

So, what does it mean when you have PERFECTED a lien?

Let's use an example to demonstrate the importance of this element:

Bob hires Larry the contractor to build a garage at his house. Bob agrees to pay Larry $20,000 for him to be the general contractor on the job. They sign a contract and Larry goes to work.

- Larry paid Adam the architect to create the necessary drawings and Adam charged Larry $2,000. Larry told Adam he would pay him once the job was done and he collected his money from Bob.

- Larry ordered the lumber from Home Depot and they had it delivered to Bob's house. Larry had good credit so Home Depot didn't require immediate payment because Larry has a line of credit there. Total cost was $3,000.

- Larry hired Elliott the excavator to dig out the dirt for the proper foundation. Larry promised to pay him when he got his money from Bob. Total cost was $1,000.

- Larry hired Carl the cement worker to pour the required foundation at a cost of $2,000, to be paid when the entire job was completed.

- Larry hired Chad the carpenter to perform the carpentry work, which he did. Larry promised to pay him when the job was done. Total cost was to be $2,000.

- Larry also hired Pat the plumber. His charges were $1,000.

- He hired Ed the electrician to perform work at a cost of $1,000.

Four weeks after the job was done, Larry still hadn't been paid by Bob. Bob said he was busy dealing with personal problems:

- His wife left him
- His dog died
- He lost his job: and
- His daughter quit medical school and joined the peace corps.

In the meantime, all of Larry's sub-contractors were quickly losing patience because Larry hadn't paid them yet.

As a result Adam the architect, Home Depot, Elliott the excavator, Carl the cement worker, Pat the plumber, Ed the electrician, and Chad the carpenter all filed liens against Bob's property, in that order. Larry did not file a lien.

The bank sold the property at foreclosure and ended up with $10,000 more than what was owed to the bank.

The total debt owed to all these lienholders comes to $12,000. Which of these lienholders gets a piece of the $10,000 balance - because there's not enough to go around? They all perfected their liens. Now what?

This is where PERFECTING the lien is so important.

The answer is this: <u>Those who perfected their liens first, get paid first</u>. Second in time gets paid second. Third in time gets paid third, and so on...until the available money runs out.

PERFECTING your lien simply means FILING or RECORDING it. It puts the world on notice: *<u>"If you do business with Bob, you need to know there's a lien or two on his home."</u>*

Let's go back to Section 3504:

> "The lien created by this section may be, in the discretion of the county commissioners and the board, **<u>perfected</u>** as to real property and fixtures ***<u>by recording</u>*** a document entitled: notice of lien and application for financial assistance, in any county recorder's office in this state in which the applicant and obligated person own property [within 30 days of the filing of the indigency application]."

It's sort of like standing in line to get into the rodeo. You have your tickets and now you have to stand in line to get in and get a good seat.

First one in line gets through the door first. The one behind him is next. There are no cuts.

Once you take your spot and make your presence known, everybody else who shows up has to get in line behind you.

If you're first in line, you might say that you have first priority for the good seats. The person behind you has second priority.

Many others have purchased their tickets but now that the gates are about to open, those tickets will not secure their place in line.

They have to actually show up. Larry had a ticket to the rodeo but he never showed up to get a spot in line, so he's going to miss the show.

And that is what it means to PERFECT YOUR LIEN. The law says that a county has a ticket to the rodeo just as soon as an application for assistance is filed with you.

But until you show up to secure your place in line (by recording your lien), your place in line will not be secured.

In all standard lien cases when you PERFECT or RECORD your lien, your date of recording creates your position of priority (or your place in line) in relation to others who may have filed liens before or after you. It's a first come, first served process.

In our liens, however, the statute says if we file within the 30 day window, our priority date goes back to the first date of service listed on the application, which is better than our filing date.

So, our place in line just got a little better once we PERFECTED the lien.

When we show up at the rodeo, we get to move ahead a few spots in the line – and sometimes – right to the front of the line.

So, it doesn't matter when we record our liens, it's just important that we do it within the 30 day time limit.

If you file on day 31 or later, you still have a good lien, you just lose the prime priority date given by the statute (date of service). Your priority date is now the date you recorded your lien and NOT the first date of service. And you lose your sweet spot in line.

So, what priority date do we get on an application for future services that will not be provided for another 3 months?

The statute says our priority date is the date of the services.

I think a court would follow common lien law and recognize your priority date as the date you recorded your lien – despite what the statute says.

THE DIFFERENCE BETWEEN LIENS AND REIMBURSEMENT ORDERS

So, let me say this about liens and reimbursement:

Liens and Reimbursement are not the same thing.

> Example: Your county & CAT paid Bob's medical bills in the amount of $100,000. Because of his financial situation at the time, your commissioners signed an *Order of Reimbursement for only $10,000*, payable monthly over 5 years. He doesn't pay anything and your Board says to enforce the Order of Reimbursement. What can you do?
>
> A. Foreclose on the lien, sell the property and kick Bob out of his house
> B. Send Bob's case to collections to collect the $100,000
> C. Send Bob's case to collections to collect the $10,000
> D. Cry like a little girl

We'll come back to this question is a minute.

How many of you believe the county has a right to foreclose on their lien?

When you research lien law you will find that most liens are required to state the dollar value of the debt.

The lien is merely a legal mechanism to make sure your debt gets paid. This type of lien generally doesn't give you any other rights – unless the property is sold or re-financed.

Idaho law gives the lienholder the right to redeem the lien, but that's getting far beyond our interests in medical indigency.

Our liens don't state a dollar amount because at the time we file them, we don't always know the full amount that we will pay out.

And, our liens generally don't identify the specific property we are trying to lien.

Anyway - if a creditor want to foreclose – the only time they have that right is if the debtor defaults on the debt.

And in our world, our liens don't state the debt amount – so how do we determine the amount of the "DEBT"? We'll get to that question later.

I don't know if a county has the right to foreclose, but even if a county could foreclose, ***there are reasons why foreclosure by a county is not a good idea.***

Foreclosing on property will require you to file a lawsuit to start the process.

Then, there are a lot of legal steps to go through to get title to the property placed in the county's name, after which they can sell it.

But why would a county ever want to do this? It would not make for good press and it creates a lot of work for somebody.

The county would also assume all liability regarding the property, including

- Taxes due
- Federal Tax liens on the property
- Hazards or waste found on the property
- Safety issues regarding construction, etc.

Now, in addition to sending the case to collections, you could convert the OR into a civil judgment.

While this is a very easy process I don't see any real benefit to doing this unless either of two situations arises:

1. The applicant has defaulted on a promissory note AND you know he has money or assets or newly acquired wages or wealth that you can attach with your judgment; or

2. If the county loses its lien during a consensual lien process - that we'll discuss later.

If you do this, remember that you have to renew your judgment every 5 years. You don't have to do this with a lien or an OR.

It's really something you need to visit with your attorneys about.

If your lien is properly filed, converting an OR to a civil judgment does NOT make your lien any stronger.

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C is the answer to our hypothetical. You've ordered Bob to reimburse the county $10,000. That's all Bob owes you.

What about the other $90,000?

We would all say that this is why we have our lien...That his property owes you $100,000 – (less any payments he makes on his OR). – At least that's the argument.

But, remember, the statute that creates our lien does not tell us the dollar value of our lien.

These are two different things.

Some would say that you have your OR amount – and you have your lien amount.

And in my view, they are different animals.

Remember what a lien is by legal definition. It is merely a declaration to the world that the landowner owes the county and CAT some money.

Our liens are not in themselves an obligation to pay. They are not promissory notes. Need more proof? OK.

How many of you believe the value of our liens is for the entire amount of money paid out by the county and CAT?

OK.

Now, let's go back to Idaho Code 45-111

The creation of a lien <u>does not of itself imply that any person is bound to perform the act</u> for which the lien is a security.

And 45-101 which is the legal definition of a lien:

A lien is a charge imposed in some mode...upon specific property <u>by which it is made security for the performance of an act.</u>

Now, let's turn to the order of reimbursement.

What is the dollar value of this thing we call the order of reimbursement?

ANSWER: There is no universal answer to this question. It's not a "one size fits all."

It is found in each order of reimbursement.

31-3510A says:

"Receipt of financial assistance pursuant to this chapter shall obligate an applicant to reimburse the obligated county and the board...

Now we're getting somewhere. It says that if we pay your bills, you are required to reimburse us.

But – how much?

We read on –

"...for such reasonable portion of the financial assistance paid on behalf of the applicant as the county commissioners may determine that the applicant is able to pay from resources over a reasonable period of time."

Nothing in Chapter 35 says the applicant is automatically responsible to pay back the full amount paid out on his behalf.

In fact, the very existence of Section 31-3510A on Reimbursement argues against any such notion.

It is very clear about what the applicant owes: Our assistance "*...shall obligate an applicant...*" to pay the amount set by the county commissioners.

> *This section leads to the logical argument that when the county sets an order of reimbursement, they are establishing a dollar amount that the applicant owes.*

That is, they are creating a dollar value of the debt.

Remember how we talked about how most liens state a dollar value of the debt being secured by the lien, but ours doesn't?

I turn now to appellate cases and academic treatises where we read:

> *"A lien presupposes the existence of a debt. If there is no debt in the first instance, there is no need for a lien. So, a lien cannot legally exist or attach. In other words, without a debt, there can be no lien."*
>
> *AND*
>
> *"A lien continues to exist until it is satisfied or terminated, and the extinguishment of a debt discharges the lien that it secures."*

Isn't it reasonable then for an applicant to say that once he extinguishes the debt set by the OR, he no longer owes the county or CAT any money and the lien must then be released?

> *So, you have one section of the law that says an automatic lien is created on the filing of an application – but it doesn't tell us the amount of the debt being secured by the lien.*

And how do we get to the value of the debt?

Let's go back to our hypothetical where Bob hired Larry to build a garage for $20,000. Larry didn't file a lien but Adam the architect did to cover his $2,000.

Is the value of Adam's lien the full $20,000? – NO

Is the value of Adam's lien the full $12,000 billed by all the sub-contractors? – NO

The value of Adam's lien is established by the value of the debt owed specifically to him.

Then, you have this other section in our statute called **REIMBURSEMENT** that tells us how we go about establishing what the applicant actually owes us.

Once we set that amount, are we not establishing the value of the debt or the lien?

In any event – I think this demonstrates what I said at the beginnig – LIENS AND REIMBURSEMENT ARE NOT THE SAME THING...

Or are they at least related or tied together?????

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So, you might be thinking that the best way to protect the county and CAT's lien is to set your reimbursement orders for the full amount paid out.

Nope! That won't work and won't withstand a court challenge.

Why?

Because the statute on reimbursement says we can only order repayment of a "REASONABLE PORTION" to be paid over a "REASONABLE PERIOD OF TIME."

And how do we defend in court that ordering one of our applicants to repay $100,000 over any period is REASONABLE?

And it gets more depressing.

Section 31-3510A – Reimbursement – subsection 3 says an applicant can come back later to ask the county commissioners to reduce his order of reimbursement if he can show a substantial change in circumstances for the worse.

And, subsection 2 says that if the county commissioners subsequently find within a reasonable period of time that there has been a substantial change in the applicant's circumstances for the better – the reimbursement order can be changed to require payment "up to the total claim paid on behalf of the applicant."

So, are we saying that after a reasonable period of time has elapsed (whatever that means), the county loses its ability to try and collect on the full amount paid out?

We sort of get stuck on this argument when we also read 3510A(2) a little closer.

It says that the county can increase an OR up to the full amount paid out if:

- Within a reasonable period of time...
- The county finds there's been a substantial change in circumstances such that the applicant is able to pay additional amounts...
- Up to the total claim paid on his behalf.

OK, so to begin with what does each of these elements mean?

What is a "within a reasonable period of time"?

What is a substantial change in circumstances?

What would be "additional amounts"?

Now, those that argue that the lien lasts forever have to grapple with the time limitation of "within a reasonable period of time" found in this subsection.

There's no question that the county can change and increase the value of the lien, but...

The ability of the county to change the value of the lien only exists for this limited window of time.

It would seem that after that period, you can't mess with it any longer.

And, I believe, that the countys' right to increase the payback amount found in subsection (3) is equally limited to the "reasonableness" language found in subsection (1).

That is you can't require them to pay back more than what is reasonable based on their circumstances.

It is at least arguable that the order of reimbursement sets the amount of the debt and it is not automatically the full amount paid out...

...and that it takes an OR from the county commissioners if you want to collect the full amount...

If we are to believe that every applicant is required to pay us back the full amount, we have to wonder why 3510A bothers at all with giving the county commissioners authority to set a reasonable amount of reimbursement.

Why doesn't the statute say they owe us the whole enchilada?

And the county commissioners can't require the full amount unless this is considered "reasonable".

So, if I'm an attorney representing the applicant and I read subsections 1, 2, & 3 in the reimbursement section...

> *Don't I get the idea that the legislature didn't want the county or the CAT board debt hanging over the head of applicants for long periods of time?*

It's easy to get the impression that the legislature wanted to limit the obligation of the applicant to a "reasonable period of time" – not forever!

And when you consider the financial status of the population we assist – together with the ungodly costs of the medical care, it becomes even easier to draw this conclusion.

It's also easy to argue that

- An applicant is NOT obligated to pay back the full amount UNLESS ordered to do so by the county commissioners.
- And – that the commissioners cannot do this unless it's reasonable.
- And the commissioners have only a reasonable period of time to make this call.

Therefore – it's arguable that the life of the lien is equally limited and does not live in perpetuity.

Think about it. Anybody can probably repay $100,000...at – let's say $50/month – IF YOU GIVE THEM 167 YEARS!!!

> Are we really ready to argue in front of a judge that this is reasonable?

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Health and Welfare Recovery Statutue

There is one ray of hope – but it's a small one.

Subsection (5) of the reimbursement section says that the county shall have the same right of recovery as provided to the state of Idaho (HW) pursuant to 56-218 and 56-218A.

These sections talk about filing liens and foreclosing on them, but they don't do us any good because they are limited to very specific situations where the applicant dies or is institutionalized and not expected to return home.

And there are a lot of exceptions that have to be monitored and complied with before any action is taken.

It doesn't address our concerns here about the value of our specific lien.

Although – it does say we can recover the full amount paid by filing a claim against the applicant's estate and filing a lien. Which means the applicant has to die leaving property in his estate.

So, you should review this section with your attorneys. Again, a lot of variables have to align in your favor, but it is a possibility.

And 218A says if the applicant is institutionalized, we can file a lien against his property under some very limited circumstances – likely for the full amount paid out by the county and CAT.

But these special sections don't change our analysis of Chapter 35.

What About Subrogation?

Recovering the full amount paid out is mentioned in the section of Chapter 35 that says the county and CAT have a right of subrogation to all rights the providers or the applicant may have against 3rd parties who may have caused the applicant's injuries.

It says the value of that subrogation interest is for the full amount paid by the county and CAT. But this subrogation right only extends to those parties who caused or may be liable for the applicant's injuries.

It doesn't establish the debt that the applicant owes to the county or CAT. So, that's no help.

I'm not yet done raining on our collective parades, but for now...

Let's move on to something less depressing.

ENFORCING YOUR LIEN

Let's assume I didn't come here today and burst your bubbles about the value of our liens.

Let's just pretend we're all still in our sheltered indigent services worlds and we believe our liens are worth the full amount paid out.

So, the question then becomes – how do you enforce your lien?

Well, the best answer is: Unless you are going to foreclose on the lien (and I don't think we can legally do that) YOU JUST WAIT!

From a practical point, there's nothing for you to do until the property owner tries to do something with the property.

There are only 3 things they could possibly do with the property to trigger concern:

A. Sell it
B. Re-finance it
C. Give it away (all or a portion)

If you've properly filed your lien, you'll be contacted by the title company if the applicant tries to sell or re-finance the property.

This is when the county will be asked to release or subordinate the lien; or to take a consensual lien.

If the applicant tries to give the property to somebody else, my view is they're likely trying to avoid our lien; or they're just naïve about the lien.

But in this case, the receiver of the property is in a "buyer beware" status. As long as they don't try to sell or re-finance the property, they'll be fine.

But if they do one of these things, they may get an unpleasant surprise when the title company tells them about the county's lien.

WHAT PROPERTY DO LIENS ATTACH TO?

There's an interesting nuance in Chapter 35 that frankly makes no sense and may someday end up in court.

- Idaho Code 31-3504(4) says that our liens attach <u>to the property of the applicant</u> (not to the property of an obligated person).

- But, - if the applicant is married at the time of filing, the lien attaches to all property in which he/she has an interest – and that means the community property of his/her spouse, as well.

    - But then, a little further down in this subsection, the language says the lien can be filed in any county where <u>*"the applicant and obligated person own property."*</u> So, which is it?

        - Does this language implicitly authorize us to file liens against the "obligated person?"

    - So, in our world, who might be an obligated person?

        - Spouse
        - Parent of a minor applicant

<u>If a hospital files an application</u> to pay for medical services rendered to a minor, <u>who do you file a lien against?</u>

<u>If a parent files an application</u> to pay for his minor child, <u>who do you file the lien against?</u>

Remember - Idaho Code tells us we can file a lien only against the APPLICANT.

And the law allows 3rd party applications, but we don't file liens against the 3rd party APPLICANT.

In such cases, it is generally accepted that by definition, the APPLICANT is the patient.

I.C. 31-3502 defines "applicant" as "*any person who is requesting financial assistance under this chapter.*"

Is a minor child responsible to pay for these services? No – not under Idaho law. That responsibility falls on the parents (or in some cases, the state). So, we don't file the lien against the child.

Also, remember the code says we can file our lien only against the "applicant".

So, in the case of a minor child receiving services, who is the "applicant"?

Most likely it is the parents because they are the responsible party:

And, because they have legal authority to act on behalf of the minor: and

It's the parents' financial information we will be exploring...

Thus they are the ones seeking assistance with payment: thus, they are the applicant.

But if the hospital filed the application on behalf of the child, are the parents really the applicant to the point that we can file a lien against their property?

That's probably something that should be clarified if the statute is amended.

FUTURE PROPERTY

Let's talk about....the meaning of our liens if the applicant has no property...which is usually the case.

If an applicant has no property at the time the application is filed, how many of you still file your lien?

I have 2 questions for those of you who raised your hands: WHY: and AGAINST WHAT?

What are you filing your lien against?

Does our lien attach to any property an applicant may own in the future – or is it limited to the property he owns at the time of application?

When in doubt, always start with what the law says. I.C. 31-3504(4) says:

> *"Upon application for financial assistance pursuant to this chapter an automatic lien shall attach to all real and personal property of the applicant and on insurance benefits to which the applicant may become entitled. The lien shall also attach to any additional resources to which it may legally attach not covered in this section"*

So, if we break this down, the first relevant part of the language says the lien attaches to all real and personal property of the applicant.

If we stop there, you have to ask: What if the applicant doesn't own any property?

The logical answer is: in that case, our lien is worthless...or – there is no lien. That the lien does not attach to future property.

The second piece of that language includes future insurance benefits. But here, they were careful to add future benefits.

The word "future" is a modifier of the words "insurance benefits".

So, an applicant's attorney might artfully argue that had the legislature intended our liens to attach to any future property of the applicant, they would have used this same future-oriented language that they used for insurance benefits.

Since they didn't, it could be argued that the lien does not attach to future property.

Again, back to our example with Bob and Larry. Larry was the general contractor ordering lumber from Home Depot. Larry placed the order against his line of credit. Let's say Larry lives in an apartment because he doesn't own any property.

Can Home Depot place a lien against Larry's future property? Of course not. Nothing in general lien law allows this.

And the last segment of this language that is relevant says that the lien attaches to any other property to which it may legally attach.

This is the shotgun approach by saying "and let's cover anything we didn't think of when we wrote this."

But – if we're going to rely on this we have to be able to point to another statute that gives our liens against future property some teeth. I could find no such a statute.

Now, let's return to another lien law we discussed earlier and that is the legal definition of a lien in I.C. 45-101:

> *A lien is a charge imposed in some mode **upon specific property** by which it is made security for the performance of an act.*

Appellate courts in other jurisdictions have also held that:

> *"A lien is a remedy against land to enforce an underlying claim."* AND

> *"A lien is a legal right or interest that a creditor has in another's property...lasting until a debt or duty that it secures is satisfied."* AND

"Although a lien is an incident of and inseparable from, the debt it secures, it is distinct from that debt. Liens relate to assets or collateral, while the debt underlying the lien appertains to a person."

Two important things here:

1. A lien is can be imposed only on specific property: and

2. A lien is imposed on property – not the person. Except for the days of slavery, in this country I don't believe it's ever been legal to place a lien against a PERSON.

So, if I'm an attorney for an applicant, I'd say that you cannot file a lien against the APPLICANT – only against PROPERTY.

> And, I would argue, you cannot file a lien against property he does not own yet. Only against specific property.

Again, I turn to appellate cases from other states where it has been held:

"Inasmuch as a lien is method of attaching some designated property or fund, if there is no property or fund for the lien to seize hold of, there can be no lien...thus notice of the lien must be filed while the debtor still has the property or fund in their possession."

Finally, Idaho Code 45-107 provides:

"An agreement can be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence."

"In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the [property]."

In my mind, this statute makes it very clear that unless there's a written agreement between the parties, ***liens do not and cannot attach to property that the applicant does not yet own***.

This argument would mean that if the applicant doesn't own any property, you don't have a valid lien, and you can't create one without a written agreement signed by the applicant.

You can't place a lien against thin air: and you can't lien the applicant's life forever JUST IN CASE he every buys property.

To support this argument, we return again to the reimbursement section in 31-3510A where it says:

"Nothing herein shall prohibit an applicant from executing a consensual lien in addition to the automatic lien created by filing an application..."

Now, if the legislature had intended our liens to cover all future-acquired property,

> *why would they bother with this language saying in essence that if the applicant acquires other property in the future THAT OUR LIEN DOESN'T COVER,*
>
> *they can execute a consensual lien on that future property?*

A consensual lien is the agreement mentioned in I.C. 45-107.

Finally, we have I.C. 31-3510A [The Section on Reimbursement] which provides that the automatic lien created pursuant to this chapter may be filed and recorded in any county of this state ***wherein the applicant has resources***.

What's important here is not so much what this statute says as what it doesn't say.

It doesn't say you can file your lien in every county in the state. If it did, that would be saying you can file a lien against the PERSON even if he doesn't own property in those other counties.

If you could file your lien in any county, then the law would be saying that you can file liens in these counties EVEN IF THE APPLICANT DOESN'T OWN ANY PROPERTY IN THOSE COUNTIES...

And that would mean that our liens attach to FUTURE-ACQUIRED PROPERTY.

It says you can file your lien in any county where he has PROPERTY or RESOURCES that the lien can attach to.

That same section of the code says that if you can find that the applicant has resources in another state, you can file your lien there.

Again, it doesn't say you can file your lien in all of the other states – only in those states where the applicant has resources.

If you could file a lien against the person or against all future property, the law would have said that you can file your lien in any county and in any state. But – it doesn't say that does it?

Of course, if you're going to put forth a different argument in favor of the counties, I would say show me the law – because there's a chance I'm wrong.

But again, appellate cases in other states have held that:

"A lien created by statute is limited in its operation and extent to the terms of the statute and can be enforced only in the event and under the facts provided for in the statute." AND

"A statutory lien must be strictly confined within the ambit of the legislation giving it birth." [For us, that's Chapter 35]
AND – Finally, case law has held:

"The terms of the statute are controlling with respect to the character, conditions and extent of the lien: the persons who may be held liable, the amount recoverable, and the duration of the lien."

So, if somebody is going to argue that our liens are broader than what I'm suggesting, they'll have to back it up with statutory authority. I'm sorry, but I could find no such authority.

So – everything we talk about from this point on will assume that everything I've said up to this point is just a bunch of legal hyperbole. In other words, we'll just ignore it.

TYPES ACTIONS ON LIENS –

We frequently get asked to release our liens or change their status or priority. So, I'll now discuss the types of actions you might take on some of your liens.

Sometimes there's a good reason for counties to cooperate with such requests.

The first thing to remember is that if you're going to release or amend the original lien, you have to have CAT's approval if it's a CAT case – at least to the extent they want to be involved.

Full Release

- We use this when the county and & CAT have been fully reimbursed for all funds paid out on behalf of an applicant.
    - Once full payment has been made, you MUST release the lien.

- Also, you'll have to fully release the lien if you're going to do a Consensual Lien. The lien needs to be released first, and then the Consensual Lien will be recorded.

    - This is because the lender requires the release and clean title: and

    - The consensual lien replaces the original lien. We'll discuss consensual liens in greater detail later.

Partial Release

- This is used when the county will release part of their lien, and retain the other part.

When would you use this? 2 examples:

1. We had an applicant who had a large tract of land subdivided into two parcels. He wanted to build a special home on one parcel for his disabled mother but needed our lien to go away so he could get funding.

    - We did a partial release of lien with regard to the one parcel but kept the lien in place on the other parcel: then we filed a consensual lien on the parcel we released.

2. We will also use a partial release when dealing with mobile homes.

    Now, be aware that mobile homes are trouble and there's a law you should all know about.

It's called the MANUFACTURED HOME RESIDENCY ACT and you can find it in Title 55 Chapter 20. Specifically, look at Section 2009a which states that if a mobile home owner abandons the property or becomes 60 days arrears in rent:

> "...it is incumbent upon the landlord to notify in writing the lienholder and legal owner of the home and to communicate to the

lienholder and legal owner the liability for any rent and other charges specified in the rental agreement. The lienholder shall be responsible for utilities from the date of notice. However, the landlord shall be entitled to a maximum of sixty (60) days rent due prior to notice to lienholder. Any and all costs shall then become the responsibility of the legal owner or lienholder of the home..."

We stumbled on this when a mobile home park landlord sent us a letter advising us that the owner of a mobile home in his park had abandoned her trailer.

The landlord wanted us to know that under this law he would look to the county to pay the rent and utilities since we had a medical indigency lien on the property.

We found out that landlords utilize this statute for a couple reasons:

1. To collect utilities and rent; and
2. To get lienholders to remove their liens so the landlord can buy the unit and rent it out
3. To get the lienholder to pay the moving and storage costs for moving the trailer out of their mobile home park

We panicked and what do you think we did just as quickly as we could? We did a partial release of lien – specifically against the mobile home. But we left our lien in place against any other property of our applicant.

Subordination of Lien

- Subordinating your lien means that while your lien stays in effect, you agree to surrender your priority status (your place in line at the rodeo) to a future lender. The bank wants to be in first place.
    - We do this usually when the applicant doesn't have any property and he's trying to buy real property.

- We like it because now we at least have a piece of land to have our lien attach to; and

    - Because we're working under the assumption that our lien attaches to future property.

- When we do this, we don't release our lien. We just sign a document agreeing to subordinate our priority position.

<u>Consensual Lien</u>

- This is a lien that the property owner "consents" to. This is actually cited in I.C. 31-3510A – the section that addresses reimbursement. It just says the applicant can consent to a lien.

- This will usually come up on a re-finance or new purchase.

- A Consensual Lien is property specific – <u>like all liens are supposed to be</u>; whereas our initial Indigency Lien is more of a shotgun lien.

- Consensual liens are used when the lender will not accept a subordination of lien because they want a clean title.

- So, the property owner agrees that after the closing, the county can file a consensual lien and take second place.

We've been burned on these at least once when either the funding fell through or the title company failed to record the new deed.

a. That's crucial because the county cannot record its consensual lien until the deed is recorded.

b. WARNING!!! – <u>If the loan does not fund or the property owner changes his mind</u> after you've released your lien, you might be without recourse.

If you're asked to take the consensual lien route, get everything in writing from the applicant and title company.

You might have to later show a court why you did what you did by releasing your lien and that you were defrauded into doing so.

We haven't used a contract document for this sort of thing, but I think we should.

It would get the promise of the applicant and title company that if they didn't file the deed in a timely manner, the county could re-file their lien AND get back their priority status.

Not sure how legal this is, but it can't hurt.

The court might let you re-file your lien and keep your priority date.

I found a 2010 case out of New York that says a court may restore a lien that has been released through fraud or mistake.

Again – it may be that a court can restore your priority filing date also.

But even without a court battle I think you can file your lien any time you want to because it's a legitimate lien.

You may lose your priority, but the lien is still good.

And in all likelihood, you'd probably be in second place anyway just behind the lender.

- Finally, a consensual lien could come up where an applicant wants the county to release its original lien to property A and place a consensual lien on property B.
    - With our clientele, this does not happen often

WHAT HAPPENS TO OUR LIEN AFTER BANKRUPTCY?

Here's What We Believe In Ada County

Bankruptcy discharge wipes out anything the applicant owes the county or CAT at the time the bankruptcy petition is filed.

But – the property lien remains intact on property owned BEFORE the bankruptcy petition was filed.

This presents a good example of what I said earlier when I said the OR and the Lien are two different animals.

We cannot go after the applicant to repay us, because HE does not owe us anything after bankruptcy.

But, we can hold his pre-petition land accountable – and there's a bankruptcy court decision that says our lien survives.

The lien does not attach to property acquired after the date of bankruptcy discharge.

So, if an applicant who has been discharged in bankruptcy calls us afterwards:

- We never want to come across like we're trying to collect money from the applicant so we normally will not talk to him about offers regarding his pre-petition land.

- If we do talk to him, the only thing we'll say is that our lien will be released upon full payment of the lien amount.

- We don't make any payment deals with him or her. We can't. It's all or nothing at this stage.

- We had a case where a person declared bankruptcy and we had a lien on his pre-petition land. He wanted to now buy a different house and he asked us to release our lien on his first home.

We decided this would look too much like we were trying to collect on the debt so we told him no.

Interesting Question

We have bankruptcy case where the bankruptcy judge said that the county's lien against pre-petition land survives a discharge in bankruptcy.

He said our lien stays intact.

But if the debt is wiped out, what is the value of that lien and what's the point?

FILINGS LIENS IN OTHER COUNTIES IN IDAHO

I.C. 31-3510A [The Section on Reimbursement] provides that the automatic lien created pursuant to the chapter may be filed and recorded in any county of this state wherein the applicant has resources – whether those resources are liquidated or unliquidated. What is "liqudated"? = converted into cash.

Unliquated assets are all assets other than cash. If an applicant owns 12 head of cattle and that has a market value, that is an asset, but it is unliqudated because they can't use it to pay the county back.

He may use the cattle to pay off a debt he owes to another farmer by simply giving him some of all of the cows because that farmer is willing to trade in unliqudated assets. The county is not. We want money, not cows!

Another example: if a person owns his own business and his records show that he has $200,000 in accounts receivable, that means people owe him that much money. On his balance sheet that shows as an AR, but it shows in the plus column as an asset.

Those potential funds are "unliqudated assets". It's not cash but it has some market value and so it is a form of an asset.

In our world in indigent services our liens attach to all property whether it's cash or any other property.

FILING OUR LIENS IN OTHER STATES

In the event that resources can be located in another state,

- The clerk may file the lien with the district court in its county and
- Provide notice to the recipient,
- The recipient shall have twenty (20) days to object,
- Following which the district court shall enter judgment against the recipient.
- The judgment entered may thereafter be filed as provided for the filing of a foreign judgment in that jurisdiction.

WHAT PERSONAL PROPERTY DOES OUR LIEN ATTACH TO?

Sending Liens to Insurance Companies & Attorneys

Any time we send copies of liens to other entities, we're doing it as a form of NOTICE to them.

They can't legally ignore this and this is why we do it in letter/notice form and keep copies to document it.

1. If the injuries are the result of an accident, we send the lien to property and auto insurance companies, and life insurance companies if the life insurance is payable to the estate of the applicant/patient.

2. We send the lien to counsel for the patient/applicant if they are pursuing legal action that is ongoing at the time of the medical indigency application. Our lien is good as to these funds, if recovered, even though the claim might not be related to our application.

And remember the patient's attorney is entitled to keep 25% for legal fees (31-3510); and they may try to negotiate with the county to keep a little more – like 33% - the standard rate.

`And where is it you find out about whether or not the injuries resulted from an accident and whether the applicant is using an attorney to try to recover some money? IN THE INTERVIEW!

- Remember – your real property lien that you file with the auditor/recorder does not attach to money.

- That would be the lien you hopefully filed with the Secretary of State to cover all property other than real property.

Workers' Comp & Crime Victims

We normally don't bother sending our liens to Worker's Comp or Crime Victims. Crime Victims pays the providers directly: and Workers' Comp just ignores us.

SOME GENERAL QUESTIONS

1. **What do we do when a title company calls and says the closing date on a property is set for 2 days from now? What do we do?**

    a. We tell them to wait. We don't operate on their clock. We'll try to get it processed as quickly as possible. And, they reschedule and wait for us.

2. **What if an applicant's property goes through probate and the executor of the estate deeds the property to an heir?**

    a. We don't know but we think our lien is still good.

    b. It's possible the county should file a claim against the estate during probate and be sure the probate court is aware of the lien

3. **What information should be presented to the Board of County Commissioners to consider taking action on a lien?**

    a. It all depends on what type of information your Board wants so it can make an informed decision.

    b. The form we use is in our packet on the IAC website.

4. **Who pays to have the lien paperwork drawn up by the county attorneys?**

    a. We make the applicant pre-pay us to cover those costs = $195

WHAT CAN COUNTIES DO TO IMPROVE THEIR CHANCES OF COLLECTING ON LIENS?

Remember – we don't collect on LIENS unless there's a sale of the property. We collect only on REIMBURSEMENT ORDERS

I suggest that the ability to collect on a lien is enhanced when you take a more aggressive posture on reimbursement.

Let's start there because so long as the applicant is faithfully making payments on his or her reimbursement, we're not interested in the lien.

So, I'll touch on reimbursement first and then we'll discuss some common issues involving liens.

I will focus my attention here on what Ada County does. That doesn't mean it's the only way.

I have found that counties will hear what I say and will say: "That's not how we do it."

And, that's great – please share your experiences with all of us. I think we will all discover that very few of us have been challenged in District Court over the things we do and until we get challenged, we keep doing what we think is right.

I think that's one of the many values of these conferences: Learning that there are other ways of doing things.

In Ada County, we follow some pretty strict guidelines regarding reimbursement:

- The first thing we do is make sure our first encounter with the applicant is informative about liens and reimbursement expectations

- We have 3 different forms we give to applicants either before or at the first interview.

    i. These forms explain the nature of our liens – particularly with regard to future income like lottery winnings, tax refunds, inheritance, insurance settlements, lawsuit awards, etc.

- Also, we try to get all applicants to sign a Promissory Note. They don't always comply and we can't force them to do this, but if they do it creates a legal document that gives us some legal options.

- We do consider future potential income when setting reimbursement.

- A 2010 Idaho Supreme Court case says

    i. *"it's clear that the legislature intended for the potential income of an able-bodied person to be considered as a resource from which that person may be obligated to reimburse a county..."*

    ii. I.C. 31-3510A – states the county can order the applicant to repay a "reasonable portion" of the amount paid out, based on what

the county believes they are able to pay from resources ***over a reasonable period of time.***

1. If that's not talking about future income, I don't know what is.

iii. Just remember that subsection 6 in the reimbursement law says that in order to consider future or potential income for reimbursement, you must have the applicant's doctor certify the applicant is able to work.

1. And it's my opinion you CANNOT use Dr. Dammrose to trump the applicant's doctor.

2. If the applicant's doctor says the applicant should be able to work in six months you have two choices.

    a. Put the burden on you and your staff to call the case back up in six months to set an order of reimbursement; or

    b. Order reimbursement to begin later than six months; and

3. Then put the burden on the applicant to come back in six months, if necessary, to explain why he hasn't found a job or why he can't make the full payment each month.

4. I like putting the burden on them because we don't have the staff to monitor all of these special cases.

- Our OR is computed based on no more than 40% of available monthly disposable income.

This is totally arbitrary but just having a number committed to writing helps eliminate appeals; and stops the arguing between applicants and my staff.

Our policies on Reimbursement were approved by our county commissioners.

- Every approved applicant who is employed will be subject to an OR of at least $25/month.

    i. An applicant who is not employed but able to work as of the date of the determination will be subject to the minimum reimbursement amount; and

- An applicant who is working but whose allowable monthly expenses exceed his/her income will also be subject to reimbursement.

    i. The date for the first payment for these applicants will be postponed to a date six months from the date of the Order of Reimbursement.

- No OR if Applicant is unemployed and unable to work, unless Applicant has disposable income.

- No OR if Applicant has been discharged in bankruptcy.

- Lump sum reimbursement required if applicant has disposable funds/assets such as retirement funds, mutual funds, savings accounts;

    i. *Except - if applicant is unemployed and intending to use the funds to meet living expenses*

    ii. While we can and do tell the applicant to cash in their retirement and mutual funds, these funds cannot be attached by a lien or a civil judgment execution, pursuant to Idaho Code § 11-604A, and we really can't force them to cash them in.

- Upon failure to pay (on promissory note), notice of default to applicant, and 30 days (pursuant to Idaho Code § 67-2358 (2)), account will be sent to Collection.

Applicants cannot be required to access funds through the use of credit cards, debit cards, home equity lines of credit, or cash advances in order to reimburse the county.

DIVORCES & SEPARATED SPOUSES

First, remember that community property laws are not black and white and nobody can tell you that every situation you have with divorced or separated couples can fit nicely into one box that fits all cases.

I will suggest you consult with your attorneys on these cases before you decide how to proceed.

The terms of the divorce decree are of no consequence to our determination of reimbursement.

Any division of debts or assets in a divorce decree is only binding as between the parties and should not direct our analysis for reimbursement purposes.

A medical debt that was incurred during the parties' marriage is a debt of the community, for which both spouses are obligated.

Remember, Idaho Code § 31-3510A obligates only *the applicant* to reimburse the county and the board for such reasonable portion of the financial assistance paid on behalf of the applicant.

Nothing says we can seek reimbursement from the "obligated party."

We'll talk more about the obligated party issue a little later.

So, if we order the applicant to reimburse but she says her divorce decree orders the husband to pay for her medical bills, we tell the applicant that is an issue between her and her ex-husband – and she is still ordered to reimburse the county.

Applicants Who Are Still Married But Separated

When setting an amount for reimbursement - If the applicant and spouse are still married but separated, this raises some complicated legal issues and somebody will eventually end up in court over this.

In Ada County, if the non-applicant spouse cannot be found, we will NOT consider the income, assets and expenses of non-applicant-spouse when considering reimbursement.

Again: only the "applicant" can be ordered to reimburse, but if we can locate the non-applicant spouse, because the medical debt is a community debt – and the community still technically exists - even if they are separated - and the applicant-spouse is equally entitled to the income and assets of the non-applicant spouse – we will consider the income and expenses of the absent spouse when setting reimbursement.

If the couple later divorces, the applicant can petition the BOCC to reduce the reimbursement order/payment, due to a substantial change in circumstances.

This MAY be a situation where the county decides it's prudent to convert the OR into a civil judgment against the applicant-spouse.

This is because a judgment against one married person is a judgment against the person to whom they are married – and all their property.

Our lien stays in place and we do record our liens against both the applicant and the spouse.

We haven't been challenged on this yet, but I think a good argument could be made that our lien is actually clouding the title to any separate property the spouse may have.

And, in reality, under community property laws any community property of the applicant is also the property of the spouse and so there may be no value in also naming the spouse in our liens.

So, it's important to have some pretty strict guidelines when setting reimbursement.

END -