



A Creative & Humanistic Strategy for Defeating Intolerable ERISA Liens



Marc Johnston

By Marc Johnston
OTLA Guardian

Kyle Kuch was 18 when he was struck by a drunk driver. He was crossing Boones Ferry Road in Washington County on foot. He was walking in the crosswalk and carrying a bag of groceries. A Ford Explorer slammed into Kyle at 40 miles per hour. His chest and heart took the brunt of the blow, causing a massive tear in Kyle's aorta. Witnesses recall the young man flying 25 feet in the air and slamming into the asphalt.

Kyle barely survived. As the ambulance pulled into the OHSU trauma bay, paramedics lost the young man's pulse. Resuscitation efforts obtained a thready pulse, and Kyle was rushed to the ER for repair of his aortic dissection and an aortic aneurysm. Kyle suffered a serious brain injury, broke his L5 vertebrae, sternum, pelvis, femur, pubic bone and four ribs. Following surgery, Kyle was in

a coma for eight days, and on a ventilator for 17.

Kyle's aortic dissection was catastrophic. The crash ripped and tore his heart and arteries. Blood flow to the most crucial parts of Kyle's body was disrupted. Following aortic repair surgery, He was diagnosed with spinal cord ischemia, and bilateral paraplegia of the lower extremities. The severe blunt force impact to his heart choked off blood supply to his spinal cord, causing his paraplegia. Kyle has no motor function below the nipple line.

The challenge

Nobody ever says, "one of my greatest triumphs as a trial lawyer is reducing ERISA liens." But maybe we should — especially when it can be life or death for our clients. In Kyle's case, I said exactly this — and still do to this day — because I employed a unique and, what I believe to be, humanistic approach to totally eliminate a seemingly impossible ERISA lien from a self-funded health plan.

You can do the same. This tactic will add a crucial arrow in your quiver when fighting ERISA liens from self-funded plans for your most seriously injured clients. When nothing else will work, this just might.

The problem

The person who hit my client was coming from a bar. The same bar that

overserved the him five nights per week, on more than 2,000 occasions. After leaving the bar, the man would sometimes sleep in the back of his truck in the bar's parking lot before driving to work the next morning. But most of the time, after he left the bar, the man would drive 40 minutes home to his house in Tualatin. The bar's disregard for the community's safety and its pattern and practice of overserving a man who it knew had to drive 40 minutes home after leaving the bar, coupled with Kyle's catastrophic injuries, allowed us to access the bar's \$1 million policy, the bad driver's \$250,000 policy and a judgment against the driver to pay a monthly stipend to Kyle for more than a decade following settlement.

But the real case was just beginning. Six months prior to obtaining the policy limits (and then some) we received notice from Kyle's health plan that it was a self-funded ERISA plan and was claiming a \$700,000 lien. We didn't take the plan's word for it. We requested and reviewed copies of the plan, the summary plan description and the master plan documents. (Always send a written request and obtain these three documents to determine whether the plan is, in fact, self-funded and how the lien can be attacked.) After reviewing these crucial documents, I determined the plan was truly a self-funded ERISA plan, and its language was not subject to attack by

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distinguishing it from recent U.S. Supreme Court precedents. The plan had no duty to reduce its lien for attorney's fees, the common fund or made whole doctrines, or for any other equitable defense we might make on Kyle's behalf. The plan administrator knew the case law as well as I did and refused to even discuss reducing the lien.

This lien had the potential to gut Kyle's settlement. And he needed every penny of it, and then some. For the preceding six months, I knew this issue was coming to a head. And I knew I couldn't stomach it. So I read the most recent U.S. Supreme Court cases, looked for ways to distinguish the wording of Kyle's plan, dissected the wording of the plan, compared the plan language to the summary plan description and master plan documents. And I sat and thought — and then I signed up for every audio and online CLE pertaining to navigating

ERISA liens that I could find.

The problem was serious — in the wake of the past few years of U.S. Supreme Court precedents, the self-funded ERISA plan was all powerful. So long as the plan drafted its language properly, it can collect the entirety of its lien, before attorney fees and regardless of the amount the client receives. I heard several examples of self-funded health plans taking the entirety of the settlement, leaving the client and the attorney with nothing and the lawyer holding the bag to pay the costs.

But then I heard it. I heard it while I sat on my couch at home listening to an audio ERISA lien CLE at 11 o'clock one night, with everyone in the house asleep but me. It was an offhand comment, almost said in jest by an excellent presenter and strategist — it was only a sentence or two. I am not sure exactly what he said, but I wrote in my notes:

*Can try to go directly to the employer?
Yes!*



Community members helped convert the family room into a gym, where Kyle uses his standing frame, strengthens his upper body, and tests his heart rate and blood pressure daily.

How?

It was not a revelation to me at the moment, but it got me thinking. I went to bed and got up, and I don't even think I thought about it the next day. But I reviewed my notes sometime later the next week, as I sat in my office, and it got me thinking of how I could defeat Kyle's \$700,000 lien by going directly to the employer.

The revelation

Many large corporations choose to self-insure their health insurance liabilities. Typically, the corporation will pay a company to administer the plan. Doing so, in theory, can be more cost effective for the company than purchasing separate health insurance for each employee and the employees' beneficiaries. When a qualifying company self-funds its health insurance liabilities, it obtains substantial legal benefit, including the

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highest level of legal protection when seeking to recover liens on the proceeds of negligence lawsuits. The ERISA plan holds all the cards when it comes to lien recovery. So long as the plan language is written correctly (properly disclaiming the common fund, made whole doctrine, attorney fees, equitable remedies and is clear as to what specific monies it is entitled to place its lien on), the self-funded company can require the complete reimbursement of its lien with the full weight of federal law and extremely favorable Supreme Court interpretation of that law behind it.

But the flipside is when a company self-funds its health insurance liabilities, the plan administrator takes its direction on all major decisions from the self-in-

sured entity or company. This means the entity — typically the company who employs our client, our client's wife, husband, mother or father — and not some insurance company or administrator — has complete decision-making authority to waive or reduce its lien. In Kyle's case, that meant the company where his father, Tony Kuch, worked, and which provided insurance for the Kuch family, could reduce, modify or completely waive Kyle's \$700,000 lien. The choice was up to the company. This was a silver bullet, that if fired correctly, had the possibility of making a huge difference in Kyle's future.

Now you might be asking yourself why in the hell would a company want to voluntarily waive hundreds of thou-

sands of dollars? Don't corporations love money? Aren't they beholden to their stockholders? Stop looking for legal solutions, my friends, and start looking for practical solutions. Look for business answers — that touch the hearts of the decision makers, hold marketing implications for the corporation, and potentially reveal the real and theoretical corporate culture of the organization.

The approach

I started with the realization that I am a lawyer. That no hard approach would work with this company. The company held all the chips, and I held none. I knew if I acted too aggressively, my hopes of reducing or eliminating Kyle's lien

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Hi Jim-

My name is Marc Johnston, and I am the attorney for the Kuch family and Kyle Kuch. I suggested to Tony Kuch that it might be helpful for me to contact you, to provide you and Smith Corp. with some additional information. I hope that is ok.

I know that Tony has explained some of the facts of what happened to their son Kyle. On May 20, 2015, Kyle was struck by a drunk driver while he was walking in a crosswalk, and is a paraplegic. I have attached a copy of our demand letter in this case, and pages 8-13 will give you and Smith Corp. an idea of what Kyle has gone through, and what the rest of his life will entail. I have also attached a few articles written in the local newspapers about Kyle, which will help you get to know Kyle and his situation personally.

Kyle's medical expenses to date are almost \$800,000. There are health insurance liens of about \$700,000, which along with lawyer fees and costs threaten to take the entirety of Kyle's settlement. I can give you more information about these figures at your request.

Kyle's case is not about money. It is about his protection. It is about his ability to seek and undergo the top of the line medical treatment in the hopes that someday he might be able to walk again — and for treatment of his brain injury. In November, Kyle and his family traveled to Panama where he underwent stem cell treatment which was both infused, and injected into his spine. In Panama during the course of his stem cell treatment, Kyle had a dream — his first dream since he was hit by the drunk driver. Also while receiving stem cell treatment in Panama, Kyle experienced feeling and sensation in his knee that he had not felt since the accident. Both of these experiences were breakthroughs for Kyle, and incredibly emotional. As you would guess, health insurance does not pay for stem cell treatment.

Kyle currently has a medical insurance lien on the proceeds of his case of about \$700,000. This lien is on the care Kyle received through Cigna, Smith Corp's health insurance carrier. Smith Corp. has the power to tell Cigna to not collect on this lien. From the most humble place, this is what Kyle, Tony and the Kuch family is asking of Smith Corp. The Kuch family knows this is a lot to ask, but they know that providing for Kyle's future is so very important. This might sound corny, but if Smith Corp. was able to waive its lien, it could provide an incredible amount of hope for Kyle and his family, which would both protect him and enable him to have more stem cell therapy. In all my years as a practicing attorney, I have never made such a request, but I do so with pride because I have never had a client who is so deserving.

Please reach out to me and I would be happy to provide you with additional information.

Sincerely, Marc A. Johnston

would go up in flames like a dry Northwest forest on a summer's day. I started by having a conversation with Kyle's dad. Together, we identified who in the human resources and the benefits department might have the ear of the highest level of corporate management of this huge corporation. We identified who in the company Kuch thought would support him and Kyle, and then the dad had a discussion with the right people. He told the higher up about Kyle, and he laid the groundwork and foundation for me to follow up with a telephone call and an email. I tried calling a couple times, but only got voicemail. I left one message, briefly mentioning Kyle, the case and the lien, and mentioning that I would send him some materials so he could see what Kyle and his family were facing. I was polite, respectful and deferential.

Thereafter, I sent the company repre-

sentative a letter (*see* in its unedited entirety — aside from a corporate name change — on the previous page).

A couple months later, I received the following e-mail from the administrator of the plan:

Hi Marc, I finally received confirmation from Smith Corp. that they are waiving their lien. As such, our client, Sun Life Financial, has agreed to waive their excess lien as well. We are closing our subrogation file.

Strategies for employing this tactic

Nothing about this tactic requires a working knowledge of rocket science. For me, it took only a severe motivating distaste for the idea of reimbursing this lien and taking a large part of Kyle's recovery away from him. It took outside research, beyond what was available in Oregon, to find answers and creative strategies. It took realizing that an off-

the-cuff remark by a talented speaker held great potential and might possibly make all the difference. And, finally, it took a soft and tactical humanistic approach.

In Kyle's case, I had a likeable client who was seriously and permanently injured. The young man had a community and a church and neighbors and contractors who rallied behind him and his family.

Prior to Kyle coming home from Randall's Children's Hospital, the community and church members helped to renovate his home. Contractors, friends and church members donated substantial time and materials for a number of renovations to the Kuch house. A ramp was built so Kyle could get from the car into the house. The den on the first floor was converted into a new first floor bedroom for Kyle, and the laundry room was converted into a specialized bathroom and shower for Kyle, so he could transfer from his wheelchair to the shower chair. The family room was partially converted into a gym, where Kyle uses his standing frame, strengthens his upper body, tests his heart rate and blood pressure daily, and does at home physical therapy. I provided these amazing and heart-warming stories, via local news articles, to the Smith Corp. representative, showing the renovations to Kyle's home and the outpouring of community and church support.

I wanted the company to be a part of this same community that gave time and money for the betterment of Kyle. If community members and church members and construction companies were doing all that they could to help this family, maybe Smith Corp. would do the same. I believe these articles and pictures, and the soft tone we took did the trick.

I would suggest a similar approach in your most significant cases, where the company running a self-funded ERISA plan holds the right to a large lien reimbursement. Work with the family member employee to find out who the

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decision makers are. Make sure you have materials to present to the decision-makers who can make the company feel like it is part of the community supporting the injured employee/family member. If you lack persuasive presentation material, create your own press and articles. Or go to the paper with your own pictures and story of your client. Pay someone to create a video detailing the crash and the community involvement, and highlight the virtues of your client. Consider traveling to the corporate headquarters in San Francisco or Boston or wherever with a PowerPoint presentation designed to move the decision-makers' hearts. And just like with a jury, show the corporate decision makers exactly what good this money will do for your client, and how crucial it is for your client's health, independence, mobility and security. The practice of law and the true battle to reduce self-funded ERISA liens demands no less.

Most importantly, realize that you

cannot force the corporation to do anything. So approach softly and respectfully. But you must make them care for, if not love, your client, and want to be a part of the community helping this severely injured employee or family member of the employee. And look for any way you can to turn this into a positive marketing win for the company. Produce a 30 second commercial for the company detailing its support of its employee and its employee's family. Consider what it says about a corporation that values its employees and culture so highly it is willing to give up \$700,000 so an employee's son can be protected many years from now, when there is no guarantee the employee will still be working for the corporation. Consider creating a piece about the company, either written or video, and sharing that information with the company or local news media showing the company as a good corporate citizen. If the company entirely waives a six figure lien — it is.

In the end, this is one of my favorite stories of my career as a trial lawyer, and we never had to file suit, let alone step into the courtroom. This tactic can make a real difference in our cases and our clients' lives. Sometimes a winning approach might just smack you over the head, but it will happen more often when we go out and look for it. We must remember that impactful creativity that wins the day for our clients does not happen only in the courtroom, it happens everywhere.

Marc Johnston specializes in plaintiff's personal injury, bicycle and pedestrian injuries, wrongful death, medical and chiropractic malpractice, and product liability law. He contributes to the OTLA Guardians of Civil Justice at the Sustaining Member level. He is the founder of the Johnston Law Firm, 101 SW Main St., Ste. 1905, Portland, OR 97204. He can be reached at marc@johnston-lawfirm.com and 503-546-3167.



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