

## MEDICARE SUBROGATION: NEVER LET THE “SLEEPING DOGS” LIE

By: Robert W. Kerpsack<sup>1</sup>

It has probably happened to most of us involved in personal injury litigation. After countless hours of investigation, discovery, posturing, and negotiation, a settlement of a Medicare recipient's personal injury or wrongful death action is finally reached. All of the lawyers on the case are elated. The plaintiffs' lawyer is happy because a long-overdue contingent fee appears to be on the way. The defense lawyer is happy because the claims adjuster—who acts like their own personal funds are being spent on the case—will finally stop grumbling about the defense costs being too high. Even the trial judge—who has just been relieved of having to endure a full day of testimony about the plaintiff spouse's *substantial* loss of consortium claim—is happy. This settlement euphoria is often short-lived, however, when everyone realizes that Medicare has a statutory lien against the settlement proceeds, and there is no one to contact to quickly verify the amount of the lien.

Personal injury claimants always want to know the amount of their net recovery, after the claims against the gross settlement proceeds are paid. As a plaintiffs' lawyer, I have struggled many times with the uneasy feeling of not being able to quickly advise a client what portion of their personal injury settlement belongs to Medicare. My uneasiness accelerates in cases of compromise settlement, where the issue of liability or injury causation is hotly contested. From attending continuing education courses on subrogation, I know that 42 USC 1395y(b)(2)(B)(iii) creates a right of subrogation against a Medicare recipient's personal injury or wrongful death settlement. I also know that an express “formula” for calculating a Medicare lien is set forth within 42 CFR 411.37(b). In cases where the Medicare payments exceed the settlement amount, however, the lien formula can result in the Medicare recipient receiving nothing, with only the plaintiff's lawyer and Medicare being paid. What personal injury claimant in their right mind is going to agree to such a result? From time to time, Medicare does waive liens when enforcement is “against equity and good conscience” (see 42 CFR 405.358); however, the waiver application process can tie-up a disbursement of the net settlement proceeds for a year or more.

Why not just disburse a Medicare recipient's personal injury or wrongful death settlement without notifying Medicare? Chances are Medicare will never find out about the settlement. Unfortunately, Medicare recipients, their lawyers, and the liability insurers paying the settlement are all individually liable for reimbursing Medicare, pursuant to 42 CFR 411.24(h) and (i). These federal regulations can send a chill down the spines of plaintiffs' lawyers; however, most liability insurers can easily protect themselves from an unliquidated Medicare lien simply by issuing a single settlement check payable to the plaintiff, the plaintiff's lawyer, and the United States of America. The first time I received such a settlement check, I was in for a rude awakening when it came time to deposit the check. When I tried to find someone at Medicare who could provide me with express authority to endorse the check on behalf of the United States, I quickly realized that *no one*

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in the entire federal government is empowered with such authority. The Medicare folks suggested only that I have the check endorsed by the other payees, and send the check to them. When they determined the amount of the Medicare lien (which I estimated to be only a small percentage of the settlement), my client would receive a refund for any "overpayment," a process that could take years! But my client needed the net settlement funds immediately. Luckily, I was able to persuade the liability insurer to issue a new check without the United States' name, in return for my personal indemnification. A substantial portion of the net settlement proceeds was then disbursed to the client, holding in trust the estimated Medicare lien amount. About one year later, I finally received confirmation that the Medicare lien amount was less than the amount being held in trust.

In today's personal injury litigation climate, fewer and fewer liability insurers seem to be inclined to ignore unliquidated Medicare liens in return for an indemnity agreement offered by the plaintiff or by the plaintiff's lawyer. With some forethought, however, Medicare subrogation can still be managed appropriately and expeditiously. In litigation cases, Medicare can be named in the Complaint as an interested party plaintiff or defendant, pursuant to Rule 19 of the *Ohio Rules of Civil Procedure*. The Assistant U.S. Attorney entering an appearance in the action on behalf of Medicare is going to be equipped to quickly liquidate and obtain authority to settle the Medicare subrogation lien. Of course, Medicare subrogation is a "federal question;" however, the U.S. Attorney in Ohio rarely removes state court personal injury actions to federal court. Even in non-litigation personal injury and wrongful death cases, local U.S. Attorneys' offices can be very helpful in facilitating and streamlining the process of liquidating and settling Medicare liens.

In working on resolving Medicare subrogation claims, I have come to learn that the regional offices of the U.S. Attorney in Ohio have an established policy and practice of recommending that Medicare take no more than one-third of a gross personal injury or wrongful death settlement, regardless of the amount of the Medicare lien. Obviously, there are exceptional cases where the recommendation of the U.S. Attorney is going to be rejected; however, it has been my experience that it is usually safe to disburse a Medicare recipient's settlement, holding one-third of the proceeds in trust until the Medicare lien can be verified and resolved. Frequently, a telephone call to the local Assistant U.S. Attorney handling Medicare subrogation is all that is necessary to obtain an agreement or consent that one-third of the settlement proceeds will be held in trust to cover the potential Medicare lien.

In conclusion, verifying the amount of a Medicare subrogation lien against a personal injury or wrongful death settlement can be a slow and frustrating process. I substantially reduce my own frustration by joining Medicare as a party in litigation cases, and by establishing working relationships with the local Assistant U.S. Attorneys who handle Medicare subrogation. I never let the Medicare subrogation "sleeping dogs" lie. These "dogs" can awake to bite the Medicare recipient, their lawyer, and the liability insurers paying the settlement.