THE PLACE FIRM

PLAINTIFF LIEN RESOLUTION COUNSEL

Attorney Liability for Client's Liens: Medicare, Medicaid & ERISA

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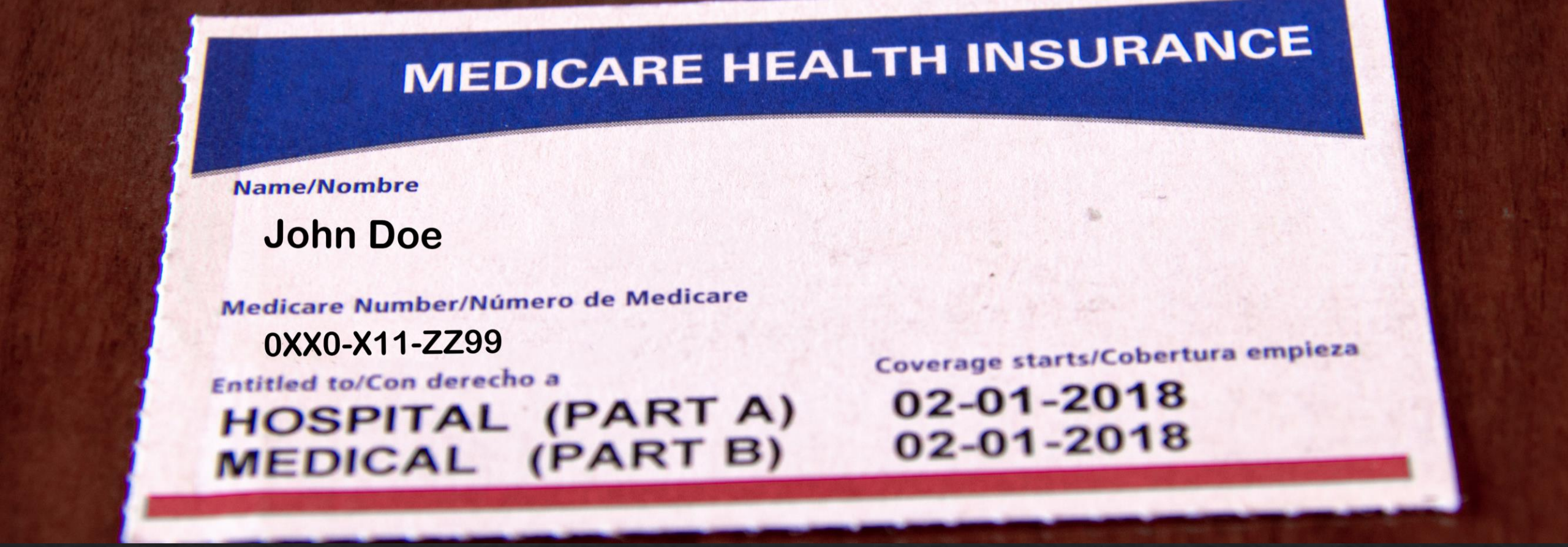
Presenter: David L. Place, Esq.

- Supreme Court of Kentucky
- District of Columbia Court of Appeals
- U.S. Federal District Court for the Eastern District of Kentucky
- U.S. Federal District Court for the Western District of Kentucky
- U.S. Court of Appeals for the Fourth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- Supreme Court of the United States of America

Mr. Place exclusively assists personal injury victims and plaintiff counsel with complex lien resolution problems using his more than 20 years of subrogation experience to ensure the settlement dollars created by the trial attorney are protected.



Traditional Medicare

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Attorney Independently Liable

FOR IMMEDIATE RELEASE

Monday, June 18, 2018

Philadelphia Personal Injury Law Firm Agrees to Start Compliance Program and Reimburse the United States for Clients' Medicare Debts

"When an attorney fails to reimburse Medicare, the United States can recover from the attorney—even if the attorney already transmitted the proceeds to the client."

"Congress enacted these rules to ensure timely repayment from responsible parties, and we intend to hold attorneys accountable for failing to make good on their obligations.

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Attorney's Duty to Repay

FOR IMMEDIATE RELEASE

Monday, March 18, 2019

Maryland Law Firm Meyers, Rodbell & Rosenbaum, P.A., Agrees to Pay the United States $250,000 to Settle Claims that it Did Not Reimburse Medicare for Payments Made on Behalf of a Firm Client

"We intend to hold attorneys accountable for failing to make good on their obligations to repay Medicare for its conditional payments."

"[T]hose receiving the proceeds of the settlement or judgment, including the injured person's attorney, are required to repay Medicare for the conditional payments."

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Cannot Shift Responsibility

FOR IMMEDIATE RELEASE

Monday, November 4, 2019

Baltimore Plaintiffs' Law Firm Saiontz & Kirk, P.A., Pays the United States Over $90,000 to Settle Allegations that it Failed to Reimburse Medicare For Payments Made on Behalf of Firm Clients

"Plaintiffs' attorneys cannot refer a case to or enter into a joint representation agreement with co-counsel and simply wash their hands clean of their obligations to reimburse Medicare for its conditional payments."

"We intend to hold attorneys accountable for failing to make good on their obligations to repay Medicare for its conditional payments, regardless of whether they were the ones primarily handling the litigation for the plaintiff."

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Prosecutions Continue

FOR IMMEDIATE RELEASE

Wednesday, January 8, 2020

Philadelphia-Based Personal Injury Law Firm Agrees to Resolve Allegations of Unpaid Medicare Debts

"This settlement agreement should remind personal injury lawyers and others of their obligation to reimburse Medicare when they receive settlement or judgment proceeds for their clients."

"Lawyers need to set a good example and follow the rules of the road for Medicare reimbursement. If they don't, we will move aggressively to recover the money for taxpayers."

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DOJ Settlement Components

In each of these cases the Department of Justice not only required lump sum settlement payments from the respective law firms, but they also required each firm to institute specific Medicare file handling protocols. These protocols are identical in each case.

- Designate a person at the firm responsible for paying Medicare secondary payer debts;
- Train the employee to ensure that the firm pays these debts on a timely basis; and
- Review any additional outstanding debts to ensure compliance.

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Regulatory Authority

- "CMS has a right of action to recover its payments from any entity, including a beneficiary, provider, supplier, physician, **attorney**, state agency or private insurer that has received a primary payment."
  42 C.F.R. §411.24(g)
  - *United States v. Weinberg*, 2002 U.S. Dist. LEXIS 12289 (E.E. Pa. July 1, 2002).
  - *United States v. Harris*, 2009 U.S. Dist. LEXIS 23956 (N.D. W. Va. March 26, 2009) affirmed, 334 F. App'x 569 (4th Cir. 2009).
  - *Denekas v. Shalala*, 943 F. Supp. 1073 (S.D. Iowa 1996).

- "If it is necessary for CMS to take legal action to recover from the primary payer, CMS may recover **twice** the amount specified."
  42 C.F.R. §411.24(c)(2)

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MSPRP-The Medicare "Portal"

The single most useful tool in addressing Medicare's Conditional Payment interest is the Medicare Secondary Payer Recovery Portal (MSPRP) – often just call the Medicare Portal.

USE IT!

https://www.cob.cms.hhs.gov/MSPRP/login

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MSPRP- Functionality

- **FREE**
- Same tool used by all lien resolution vendors
- Full file management
  - Reporting
  - Auditing/Disputing
  - Correspondence
  - Pre-mediation final claim amount
  - First and second level appeals
  - Wavier/Compromise/Refund requests
- Living viewing of CMS file actions
- Up to date claim amounts
  - Liability
  - No-Fault

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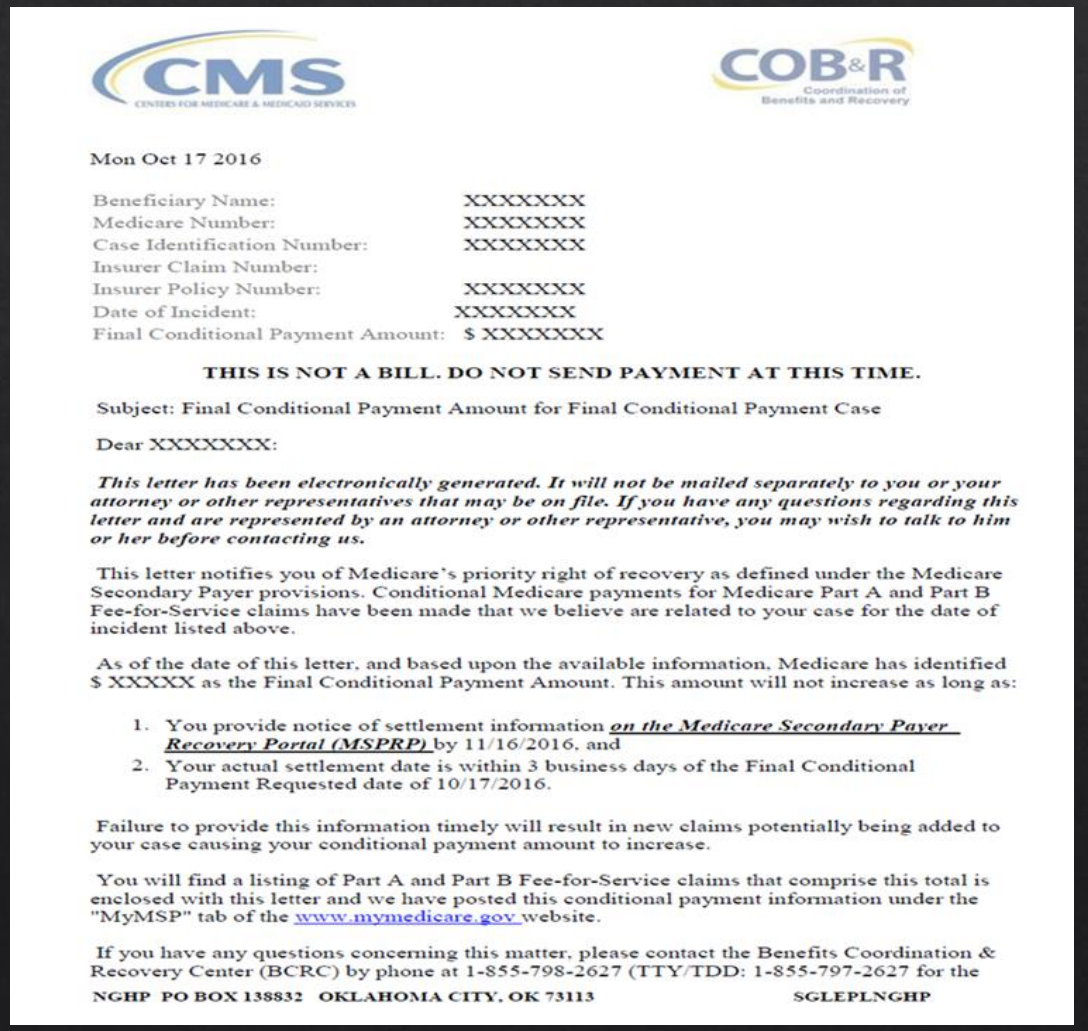
Mediation Benefits

Final CP Actions on the MSPRP

1. Notify the BCRC that you are within 120 days of settlement
2. Resolve disputes during this 120-day period
3. Request Final CP Amount within this 120-day period
   - Note: You must settle your case within 3 business days of requesting the Final CP Amount
4. Submit settlement information within 30 calendar days of requesting the Final CP Amount



CMS CENTERS FOR MEDICARE & MEDICAID SERVICES

COB&R Coordination of Benefits and Recovery

Mon Oct 17 2016

Beneficiary Name:	XXXXXXX
Medicare Number:	XXXXXXX
Case Identification Number:	XXXXXXX
Insurer Claim Number:	
Insurer Policy Number:	XXXXXXX
Date of Incident:	XXXXXXX
Final Conditional Payment Amount:	$ XXXXXXX

THIS IS NOT A BILL. DO NOT SEND PAYMENT AT THIS TIME.

Subject: Final Conditional Payment Amount for Final Conditional Payment Case

Dear XXXXXXX:

This letter has been electronically generated. It will not be mailed separately to you or your attorney or other representatives that may be on file. If you have any questions regarding this letter and are represented by an attorney or other representative, you may wish to talk to him or her before contacting us.

This letter notifies you of Medicare's priority right of recovery as defined under the Medicare Secondary Payer provisions. Conditional Medicare payments for Medicare Part A and Part B Fee-for-Service claims have been made that we believe are related to your case for the date of incident listed above.

As of the date of this letter, and based upon the available information, Medicare has identified $ XXXXX as the Final Conditional Payment Amount. This amount will not increase as long as:

1. You provide notice of settlement information ***on the Medicare Secondary Payer Recovery Portal (MSPRP)*** by 11/16/2016, and
2. Your actual settlement date is within 3 business days of the Final Conditional Payment Requested date of 10/17/2016.

Failure to provide this information timely will result in new claims potentially being added to your case causing your conditional payment amount to increase.

You will find a listing of Part A and Part B Fee-for-Service claims that comprise this total is enclosed with this letter and we have posted this conditional payment information under the "MyMSP" tab of the www.mymedicare.gov website.

If you have any questions concerning this matter, please contact the Benefits Coordination & Recovery Center (BCRC) by phone at 1-855-798-2627 (TTY/TDD: 1-855-797-2627 for the

NGHP PO BOX 138832 OKLAHOMA CITY, OK 73113 SGLEPLNGHP

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Audit & Dispute

- Contact Medicare noting which claims are not related and why.
- If the injury claimed is complex in nature, provide medical records to support your dispute
- Hospital Acquired Conditions
- Is unrelated care “bundled” with related care?
- Do not use a highlighter as Medicare scans their documents in and thus highlighting does not show up.
- Don't forget to send your Correspondence Cover Sheet.

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Hospital Acquired Conditions

- HAC 01 Tab – Foreign Object Retained After Surgery ICD-10-CM diagnosis code list
- HAC 02 Tab – Air Embolism ICD-10-CM diagnosis code list
- HAC 03 Tab – Blood Incompatibility ICD-10-CM diagnosis code list
- HAC 04 Tab – Stage III and IV Pressure Ulcers ICD-10-CM diagnosis code list
- HAC 05 Tab – Falls and Trauma ICD-10-CM diagnosis code list
- HAC 06 Tab – Catheter-Associated Urinary Tract Infection (UTI) ICD-10-CM diagnosis code list
- HAC 07 Tab – Vascular Catheter-Associated Infection ICD-10-CM diagnosis code list
- HAC 08 Tab - Surgical Site Infection (SSI)-Mediastinitis Following Coronary Artery Bypass Graft (CABG) ICD-10-CM diagnosis and ICD-10-PCS procedure code lists
- HAC 09 Tab – Manifestations of Poor Glycemic Control ICD-10-CM diagnosis code list
- HAC 10 Tab – Deep Vein Thrombosis (DVT)/Pulmonary Embolism (PE) with Total Knee or Hip Replacement ICD-10-CM diagnosis and ICD-10-PCS procedure code lists
- HAC 11 Tab – Surgical Site Infection (SSI) Following Bariatric Surgery ICD-10-CM diagnosis and ICD-10-PCS procedure code lists
- HAC 12 Tab – Surgical Site Infection (SSI) Following Certain Orthopedic Procedures of Spine, Shoulder or Elbow ICD-10-CM diagnosis and ICD-10-PCS procedure code lists
- HAC 13 Tab - Surgical Site Infection (SSI) Following Cardiac Implantable Electronic Device (CIED) Procedures ICD-10-CM diagnosis and ICD-10-PCS procedure code lists
- HAC 14 Tab – *Iatrogenic Pneumothorax with Venous Catheterization ICD-10-CM diagnosis and ICD-10-PCS procedure code lists

- Specific items/ ICD-10 codes that Medicare should not have paid.
- Apply facts of specific case and extrapolate from this list when disputing.
- https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalAcqCond/icd10_hacs.html

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Bundled Charges

CMS — COB&R Coordination of Benefits and Recovery

71	372917076227880	001	03502	[redacted]	ICD-10	M6281, E139, F0390, G20, I10, I4891, I639, I779, S72009A	03/10/2017	03/10/2017	$332.00	$159.25	$159.25
71	372917076227880	002	03502		ICD-10	M6281, E139, F0390, G20, I10, I4891, I639, I779, S72009A	03/11/2017	03/11/2017	$172.00	$81.95	$81.95
71	372917090004510	002	03502		ICD-10	G458, I6523, M25551, M25552	03/10/2017	03/10/2017	$47.00	$8.51	$8.51
71	372917090004510	004	03502		ICD-10	G458, I6523, M25551, M25552	03/11/2017	03/11/2017	$216.00	$36.26	$36.26
71	372917096170630	001	03502		ICD-10	S72002A, E119, E860, F0390, G20, I10, I2510, I639, N179, R414, W19XXXA, Y92238	03/10/2017	03/10/2017	$416.39	$137.93	$137.93
71	372917082011330	001	03502		ICD-10	S72002A	03/11/2017	03/11/2017	$225.00	$107.66	$107.66
71	372917082011330	002	03502		ICD-10	S72002A	03/12/2017	03/12/2017	$1,977.00	$727.04	$727.04
71	372917076227870	001	03502		ICD-10	S72009A, D72829, E139, F0390, G20, I10, I4891, I639, I779, M6281, N179	03/12/2017	03/12/2017	$172.00	$81.95	$81.95

Cal. Ins. Guar. Ass'n v. Burwell

United States District Court for the Central District of California

January 5, 2017, Decided; January 5, 2017, Filed

Case No 2:15-cv-01113-ODW (FFMx)

- "The statutory phrase 'an item or service' clearly does not refer to multiple medical treatments just because they appear under one charge."

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Repayment Calculations

- C.F.R. 411.37(c)
  - Medicare payments are less than the judgment or settlement.
    - Add (Attorney's Fees) and (Costs) = Total Procurement Costs
    - (Total Procurement Costs) / (Gross Settlement Amount) = Ratio
    - Multiply (Lien Amount) by (Ratio) = Reduction Amount
    - (Lien Amount)-(Reduction Amount) = Medicare Demand

- C.F.R. 411.37(d)
  - Medicare payments equal or exceed the judgment or settlement.
    - Add (Attorney's Fees) and (Costs) = Total Procurement Costs
    - (Gross Settlement)-(Total Procurement Costs) = Medicare Demand

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42 CFR § 411.37

Attorney fees & litigation expenses = "Procurement Costs"

"Procurement costs are incurred because
1. the claim is disputed; and
2. Those costs are borne by the party against which CMS seeks to recover."

- Does not apply to No-Fault settlements since they are undisputed.
  - CMS maintains a separate liability and no-fault files within their system.
  - The liability and no-fault recovery amounts are individually itemized when settlement is reported to CMS/BCRC.

- May lose reduction if CMS is required to "file suit."

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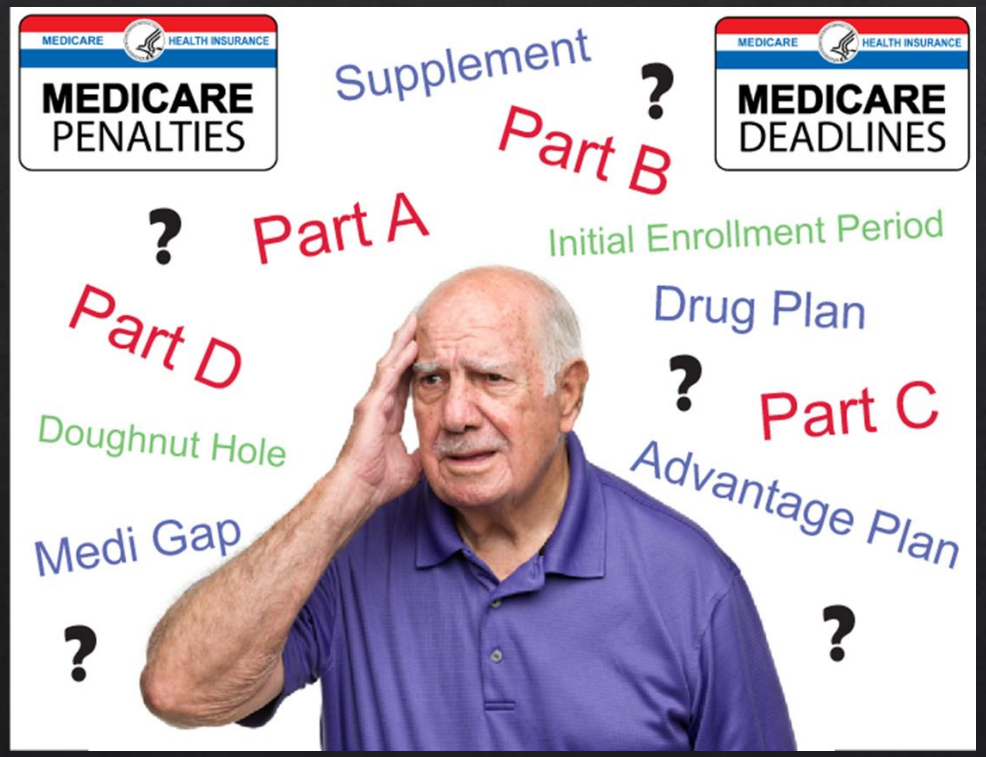
Medicare Advantage Organizations



- Medicare Parts C & D
- Medicare "Replacement" Plans as opposed to Medicare "Supplement" Plans.
- Medicare pays a fixed amount for your care every month to the companies offering MAO Plans.
- These companies must follow rules set by Medicare.

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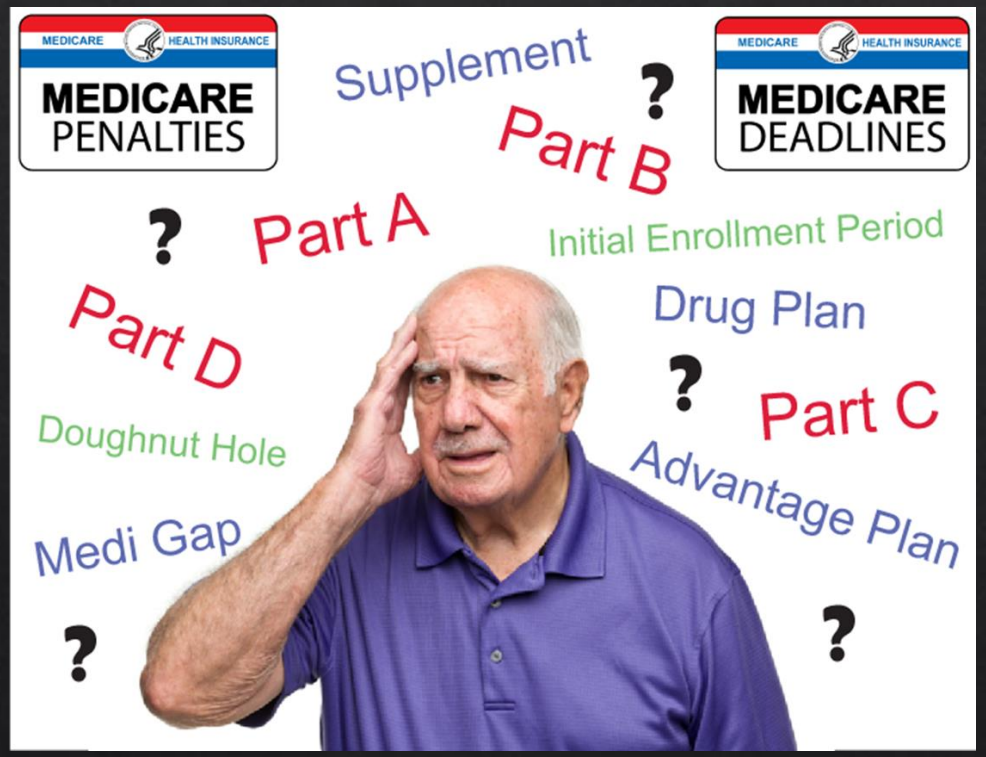
Medicare Supplement Plans



- There are 10 standardized "Medigap" plans available in most states.
- These plans are governed by state subrogation/reimbursement laws.
- Common Types – F, G, K, L, M, & N

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MAO Plans Recovery Rights

- Exactly the same as CMS under Parts A & B.

- "The district court concurred with the Third Circuit's analysis of the MSP private cause of action and held that '[t]he statutory text of the MSP Act clearly indicates that MAOs are included within the purview of parties who may bring a private cause of action.' We agree."
- *Humana Medical Plan, Inc. v. Western Heritage Ins. Co.*, No. 15-11436 (11th Cir. Aug. 8, 2016)

- "The United States may … collect **double damages** against any [ ] entity … that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity."
  Humana v. Paris Blank LLP, 2016 U.S. Dist. LEXIS 61814 Document 23 (E.D. Va. 2016)

Medicaid

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Notice?

- This is the first question in every discussion of Medicaid subrogation.
  - All but approximately 8 states have mandatory reporting requirements upon the initiation of a claim against a third party.
  - Most state Medicaid statutes create an automatic lien at the time payment for services is made.
  - Every state imposes some level of civil or criminal liability for failure to repay Medicaid.
  - Many states extend this civil or criminal liability directly to the trial attorney.
  - Medicaid recovery vendors are essentially data mining companies.

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Attorney Exposure

Each state varies on how they expose a trial attorney to liability for Medicaid liens; however, there are some universally applied methods.

- Automatic lien
- Authority to void any settlement
- Civil & Criminal prosecutions

- Ex. Florida – 409.910(17)(a)
- "fail[ure] to pay the agency … gives rise to an inference that [the attorney] knowingly failed to credit the state … pursuant to [FRAUD], and acted with the intent set forth in [THEFT/ROBBERY]."

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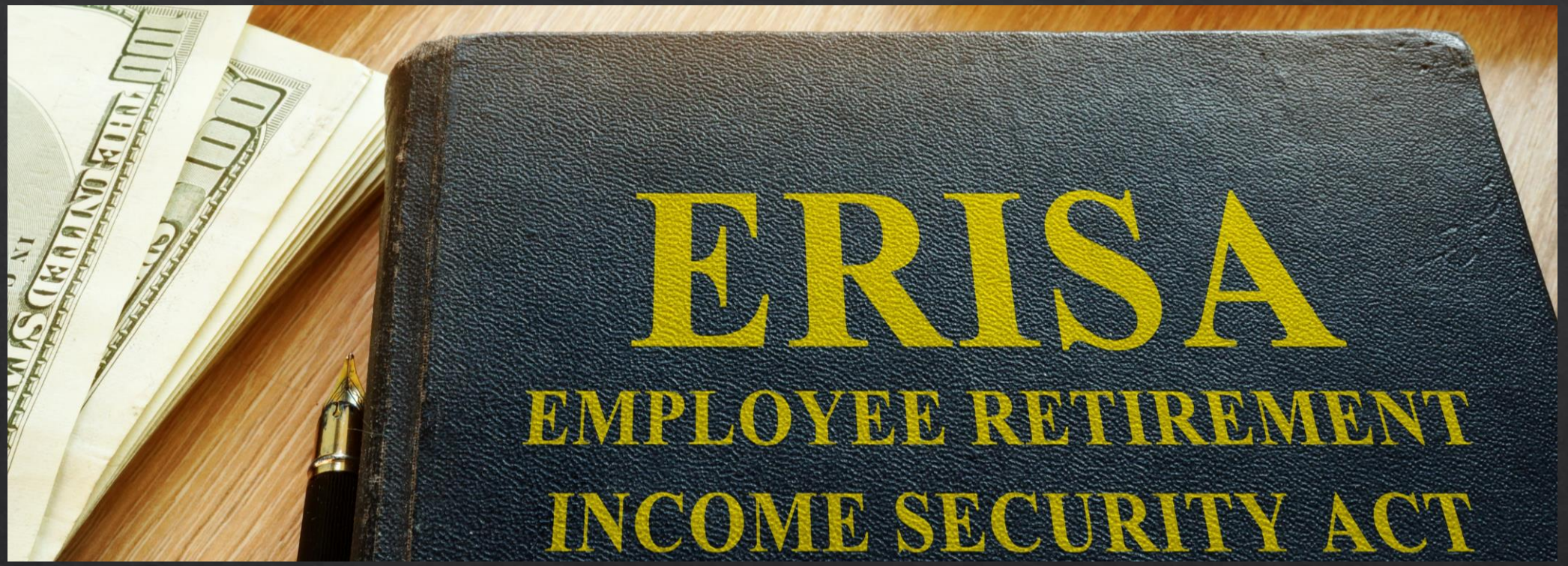
Ahlborn & Wos

- The U.S. Supreme Court unanimously held that federal law did not authorize Medicaid to assert a lien on the portion of the settlement in excess of the stipulated amount for past medical expenses. The state has no claim against those portions of a settlement the parties agreed were attributable to pain and suffering or lost wages.
  Ark. Dep't of Human Servs. v. Ahlborn, 547 U.S. 268 (2006)

- Again the U.S. Supreme Court held that Medicaid's claim was limited to what was "designated as payments for medical care." The Court rejected North Carolina's formula based statute holding "they cannot do [ ] what North Carolina did here: adopt an arbitrary, one-size-fits-all allocation for all cases."
  Wos v. E. M. A., 568 U.S. 627 (2013)



ERISA

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Attorney Liability

"[T]he claims against the Attorney Defendants are cognizable because they hold the settlement proceeds in trust or possess the funds."

"'Indeed, 'the most important consideration is not the identity of the defendant, but rather that the settlement proceeds are still intact, and thus constitute an identifiable *res* that can be restored to its rightful recipient.'"

- *Publix v Figareau* 2019 WL 6311160 (M.D. Fla. Nov. 25 2019); citing, *Treasurer, Trs. of Drury Indus., Inc. Health Care Plan v. Goding*, 692 F.3d 888 (8th Cir. 2012)
- *McKesson v Dillow*, 2020 WL 1469461 (S.D. Ohio March 25, 2020)
- *Longaberger Co. v. Kolt*, 586 F.3d 459, 468 (6th Cir. 2009)

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SCOTUS Anecdotal Support

It is important to note that The Supreme Court of the United States has made it clear over the past 20 years, starting with *Knudson*, that the correct party to name in an ERISA subrogation/reimbursement suit is whomever is holding the funds.

- Banks, Courts, Trusts, Annuities, Individuals, And now seemingly the trial attorney.

- During oral arguments for *Montanile* Justice Breyer mused aloud "We know where some of the money is. Can't the Plan go after the attorney under a theory of fraud?"

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Best Practices

- Send your 29 U.S.C. §1024(b)(4) document request to the Plan Administrator.

Plan Administrator
The person or entity named by the Plan Sponsor to manage the Plan and answer questions about Plan details. **The Plan Administrator is not the Claims Administrator.**

Plan Sponsor
The legal entity that has adopted the Plan and has authority regarding its operation, amendment and termination. **The Plan Sponsor is not the Claims Administrator.**

- The employer is the default Plan Administrator. Unless the employer is a Union.

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Requested Materials

- Copies of the Summary Plan Description (SPD), Master Plan Document (MPD), any and all other Plan Documents relating to this plan participant's health insurance from the year preceding the date of loss until present.
- The Form 5500 for the plan from the year preceding the date of loss until present, with all schedules attached.
- An itemization, including diagnosis/procedural codes and/or ICD-9 codes, for all alleged medical benefits provided which relate to the above referenced date of loss
- The latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.
- Administrative Services Contract (ASA) between the Plan and any Third Party/Claims Administrator and between the Third Party/Claims Administrator and (if any) Subrogation/Reimbursement Recovery Vendors from the year preceding the date of loss until present.
- Copies of all contracts including, but not limited to: Insurance contracts, Stop Loss Contracts, Health Insurance Contracts, Insurance Intermediary Services Contracts, and Administrative Services Contracts serving Plan participants plan from the year preceding the date of loss until present.
- Copies of the Summary of Material Modifications (SMM) statements from the year preceding the date of loss until present.
- Amendments to the Plan Documents (including, but not limited to the Summary Plan Description) from the year preceding the date of loss until present.

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29 U.S.C. §1132(c)(1)(B)

"ADMINISTRATOR'S REFUSAL TO SUPPLY REQUESTED INFORMATION; PENALTY FOR FAILURE TO PROVIDE ANNUAL REPORT IN COMPLETE FORM

Any administrator … who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described … with respect to any single participant or beneficiary, shall be treated as a separate violation."

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29 CFR § 2575.502c-1

"Adjusted civil penalty under section 502(c)(1)

In accordance with the requirements of the 1990 Act, as amended, the maximum amount of the civil monetary penalty established by section 502(c)(1) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), is hereby increased from $100 a day to $110 a day. This adjusted penalty applies only to violations occurring after July 29, 1997."

- *Law v. Ernst & Young*, 956 F.2d 364, (1st Cir. 1992)
- *Gorini*, 94 Fed. Appx. 913, (3rd Cir. 2004)
- *Bartling v. Fruehauf Corp.,*29 F.3d 1062, (6th Cir.1994)
- *Leister v. Dovetail, Inc.,* 546 F.3d 875, (7th Cir. 2008)
- *Brown v. Aventis Pharma.,* 342 F.3d 822, (8th Cir. 2003)
- *Daughtrey v. Honeywell, Inc.,* 3 F.3d 1488, (11th Cir.1993).
- *Huss v. IBM Medical Plan*, No. 07 C 7028, (N.D Dis. Ill. Nov. 4, 2009)
- *Harris-Frye v. United of Omaha*, (E.D. Tenn. Sept. 21, 2015)

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Thank You!

If you would like more information on or assistance in deal with ERISA, FEHBA, Medicare or Medicare Advantage subrogation/reimbursement matters please contact The Place Firm, PLLC.

David. L. Place
Owner
dave@theplacefirm.com

Our Mission

The Injury Victim Comes First!

The Place Firm was founded with one guiding principle - the injury victim is more in need of the settlement funds created by their trial attorney than any other party.

Our Approach

The Place Firm works with plaintiff's counsel to address the healthcare repayment demands that may be made against the injury victim's settlement. We will ensure that Medicare's "super lien" is resolved in compliance with federal law and guidelines, eliminating the exposure to the Medicare beneficiary as well as the trial attorney. Additionally, our representation in resolving ERISA, FEHBA, and Medicare Advantage subrogation demands will allow the trial attorney to settle the underlying case sooner, and with a larger net recovery for the injury victim.

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