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A Litigator's Guide to Medicare Secondary Payer Compliance

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Today's Discussion

- **Five things every litigator should know about Medicare Secondary Payer (MSP) compliance:**
 - ▶ Why MSP compliance is important
 - ▶ How to determine Medicare status of Plaintiff(s)
 - ▶ How to deal with Conditional Payments
 - ▶ What consideration to give Medicare's Future Interest
 - ▶ How to address MSP in Settlements/Releases



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Why MSP Compliance Is Important

Brief Background & History

- **Social Security Act of 1965**
 - Created Medicare

- **Medicare Secondary Payer Act of 1980**
 - “primary” v. “secondary”

- **Medicare, Medicaid & SCHIP Extension Act of 2007**
 - MMSEA
 - Mandatory reporting

- **SMART Act of 2012**
 - Changes coming

The Players

- **Social Security Administration**
 - Determines eligibility
- **The Centers for Medicare and Medicaid Services (CMS)**
 - Administers program
- **The Coordination of Benefits Contractor (COBC)**
 - CMS sub-entity
 - Information gathering entity
- **The Medicare Secondary Payer Recovery Contractor (MSPRC)**
 - CMS sub-entity
 - Handles recoveries

Medicare's Right to Reimbursement

- **It's not a lien**
 - Direct cause of action
 - Subrogation claim

- **It's not just for personal injury claims**
 - Loss of consortium, employment, bad faith
 - Emotional distress component

Medicare's Right to Reimbursement

- **Who is at risk?**
 - **Plaintiff**
 - Settlement proceeds
 - Future benefits
 - **Defendant/Insurer**
 - The primary payer
 - Double damages
 - **Counsel**
 - Contingency fees
 - Legal malpractice



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Determining Medicare Status of Plaintiff(s)

Medicare Status of Plaintiff(s)

- **Who Qualifies?**
 - Age 65 and older
 - Social Security Disability Benefits
 - End-stage renal disease
 - ALS

- **Ongoing Inquiry**
 - Status at time of settlement

Sample Medicare Card

MEDICARE			HEALTH INSURANCE	
1-800-MEDICARE (1-800-633-4227)				
NAME OF BENEFICIARY				
JOHN DOE				
MEDICARE CLAIM NUMBER			SEX	
000-00-0000-A			MALE	
IS ENTITLED TO			EFFECTIVE DATE	
HOSPITAL (PART A)			01-01-2007	
MEDICAL (PART B)			01-01-2007	
SIGN HERE →			_____	

SAMPLE

Checklist for Plaintiff's Counsel

- **Client intake process**
- **Discuss duties & risks of MSP**
 - Document file
- **Report claim to COBC**
- **Proof of Representation Authorization**

Report Claim

- **Reporting claim to COBC**
 - Best position to report
 - By phone or mail
 - Beneficiary information
 - Case information
 - Counsel information

Proof of Representation Authorization

MODEL LANGUAGE

PROOF OF REPRESENTATION

The language below should be used when you, the Medicare beneficiary, want to inform the Centers for Medicare & Medicaid Services (CMS) that you have given another individual the authority to represent you and act on your behalf with respect to your claim for liability insurance, no-fault insurance, or workers' compensation, including releasing identifiable health information or resolving any potential recovery claim that Medicare may have if there is a settlement, judgment, award, or other payment. You are not required to use this model language, but proof of representation must include the information provided in this model language. Your representative must also sign that he/she has agreed to represent you. This model language also makes provisions for the information your representative must provide.

Type of Medicare Beneficiary Representative (Check one below and then print the requested information):

- Individual other than an Attorney: Name: _____
- Attorney* Relationship to the Medicare Beneficiary: _____
- Guardian* Firm or Company Name: _____
- Conservator* Address: _____
- Power of Attorney* _____
- Telephone: _____

* Note -- If you have an attorney, your attorney may be able to use his/her retainer agreement instead of this language. (If the beneficiary is incapacitated, his/her guardian, conservator, power of attorney etc. will need to submit documentation other than this model language.) Please visit www.mspre.info for further instructions.

Medicare Beneficiary Information and Signature/Date:

Beneficiary's Name (please print exactly as shown on your Medicare card): _____

Beneficiary's Health Insurance Claim Number (number on your Medicare card): _____

Date of Illness/Injury for which the beneficiary has filed a liability insurance, no-fault insurance or workers' compensation claim: _____

Beneficiary Signature: _____ Date signed: _____

Representative Signature/Date:

Representative's Signature: _____ Date signed: _____

Rights & Responsibilities Letter



[Print Date]

Learn about your letter at www.msprc.info

Insert name
Insert address 1
Insert address 2
Insert city, state, zip code

SUBJECT: Medicare Secondary Payer Rights and Responsibilities Letter for:
Beneficiary Name:
Medicare Number:
Case Identification Number:
Insurer Claim Number:
Insurer Policy Number:
Date of Incident:

Dear [Addressee Name]

You are receiving this letter because we were notified that you filed a liability insurance (including self-insurance), no-fault insurance, or workers' compensation claim. This is confirmation that a Medicare Secondary Payer (MSP) recovery case has been established in our system.

If we know that you have a lawyer or other person representing you, we have sent him or her a courtesy copy of this letter and you will see him or her listed as a "cc" at the end of this letter.

This letter gives you information on the following:

1. What happens when you have Medicare and file an insurance or workers' compensation claim;
2. What information we need from you;
3. What information you can expect from us and when;
4. How and when you are able to elect a simple, fixed percentage option for repayment; and,
5. How to contact us.

What Happens When You Have Medicare and You file a Liability Insurance (including Self- Insurance), No-Fault Insurance, or Workers' Compensation Claim

Applicable Medicare law says that liability insurance (including self-insurance), no-fault insurance, and workers' compensation must pay for medical items and services before Medicare pays. This law can be found at 42 U.S.C. Section 1395y(b)(2)(A) and (B).

However, Medicare makes "conditional payments" while your insurance or workers' compensation claim is being processed to make sure you get the medical services you need when you need them. If you get a(n) insurance or workers' compensation settlement, judgment, award, or other payment, Medicare is entitled to be repaid for the items and services it paid for conditionally.

If you receive a settlement, judgment, award, or other payment related to this claim and Medicare determines that it has made conditional payments that must be repaid, you will get a demand letter. The demand letter explains how Medicare calculated the amount it needs to be repaid and it also explains your appeal and waiver rights. *If you decide to appeal or request a waiver of recovery, Medicare will not take any collection action while your appeal or waiver of recovery request is being processed.*

What Information We Need From You

- *Do you have a lawyer or other person representing you?*

Medicare works to protect your privacy. We are not allowed to communicate with anyone other than you about your MSP case unless you tell us to do so. If you have a lawyer or other person representing you, please see the enclosed brochure. It explains what type of information we need from you in order to work directly with your lawyer or representative.

- *Is the information we have on your claim correct?*

If the information at the top of this letter is incorrect or if you filed a no-fault insurance or workers' compensation claim and do not see the insurer/carrier listed as a "cc" at the end of this letter, please contact the Coordination of Benefits Contractor (COBC) immediately at 1-800-999-1118.

- *Has your insurance or workers' compensation claim already been resolved?*

If you already got a settlement, judgment, award, or other payment, we need the following information:

- The date and total amount of your settlement, judgment, award, or other payment.
- A list of the attorney fees and other costs that you had to pay in order to get your settlement, judgment, award, or other payment.

If your insurance or workers' compensation claim was dismissed or otherwise closed, we need documentation of that so that we are able to close your MSP case.

What Information Can You Expect From Us and When

- *Medicare's Conditional Payment Amount*

Our system will automatically send you a Conditional Payment Letter within 65 days of the date on this letter. It includes a Payment Summary Form, which lists medical items and services Medicare has paid for that we believe are related to your claim. Keep in mind that this list is not final or complete until your insurance or workers' compensation claim is resolved.

If you would like the most up-to-date claims information, please visit www.MyMedicare.gov. Once your letter is issued, you will be able to access conditional payment amount information through the MyMSP tab, as well as current claims information using the MyMedicare.gov "blue button."

How to Elect a Simple, Fixed Percentage Option For Repayment If You Have Experienced a Physical Trauma-Based Injury

If you experienced a physical trauma-based injury and you get a liability insurance settlement, judgment, award, or other payment of \$5,000 or less, Medicare offers the option to pay 25% of your gross settlement, judgment, award, or other payment, instead of the amount that Medicare would otherwise calculate.

If you wish to choose this option, you must formally elect it at the same time that you send us information on your settlement, judgment, award, or other payment. Please visit the Beneficiary or Attorney Toolkit sections of the MSPRC website (www.MSPRC.info) for all of the additional details. You will find model language that can be used to elect this option, as well as a special mailing address to ensure efficient processing.

How You Can Contact Us

Please mail any documents to: [MSPRC Address] or fax documents to: [MSPRC Fax]

For more information, please visit www.MSPRC.info or call 1-866-677-7220 (TTY/TDD for the hearing or speech impaired: 1-866-677-7294).

Sincerely,
MSP Recovery Contractor

Enclosure:
Medicare Secondary Payer Recovery Contractor Brochure

CC:

Rights and Responsibilities Brochure

Tips for Managing your Rights & Responsibilities as a Medicare Beneficiary

Managing your Liability, No-Fault or Workers' Compensation Claim

- Contacting the Coordination of Benefits Contractor (COBC) is always the first step in the process.
- Receiving this brochure, however, means that your case has already been established through COBC and with the MSPRC. Right now, the MSPRC is compiling all medical claims that Medicare paid that are related to your case.

F.Y.I! This process takes approximately eight weeks. The MSPRC is not able to provide conditional payment amounts until all claims are retrieved from Medicare's systems.

The Conditional Payment Letter (CPL):

Once all claims have been retrieved from Medicare systems and filtered (determined to be related to your case), THEN the MSPRC will issue a CPL to all authorized parties on record.

- The CPL is NOT a request for payment. It lists claims that Medicare believes are related to your case.
- Within 65 days from the date of the Rights and Responsibilities Letter you will receive the CPL.

F.Y.I! Separate requests for initial Conditional Payment Amounts will not make Conditional Payment information available sooner.

- Once the MSPRC has mailed your CPL, you may also review updated Conditional Payment Amounts on the MyMSP tab on www.mymedicare.gov website.

The Final Demand Letter:

- Once a settlement is reached, you or your representative must submit to the MSPRC the gross settlement amount, as well as attorney fees and additional costs you had to pay toward the resolution of your case.
- Medicare takes attorney fees and costs you paid into account before computing a final demand amount.
- A Final Demand Letter will be issued once the MSPRC receives and enters your settlement information.

Proof of Representation:

Do you have a Representative?
Do you have an attorney?

- Your representative may want information from Medicare in order to help you resolve your claim, BUT Medicare will not talk to anyone about you or your health related information without your permission.

HELP US HELP YOU!

- If your representative is an attorney, the MSPRC will need a copy of the Retainer Agreement you signed when you hired your attorney. This is the easiest way to tell Medicare that your attorney represents you and is allowed to make decisions for you in his or her effort to resolve your potential Medicare recovery claim.



Please make sure the Retainer Agreement includes:

- The name of the law firm in the body of the Retainer Agreement OR is on the law firm's letterhead OR includes a coversheet on the law firm's letterhead.
- Your name, printed, so the MSPRC can read it.
- Your signature and the date of your signature.
- Your Medicare Number. This helps the MSPRC make sure YOUR information goes in YOUR file.
- Your attorney's signature and the date of the signature added to the bottom of the Retainer Agreement.

F.Y.I! The MSPRC will certainly accept other proof of representation documents, as long as the required information listed above is included in whatever document you choose to send.

Check out www.msprc.info for examples, downloads

AND

SPECIAL RULES FOR ACTING ON BEHALF OF DECEASED BENEFICIARIES

My Health. My Medicare.

Want more info regarding your Medicare claims?

www.MYMEDICARE.GOV

If you do not already have a sign-in ID and password, register on the website!

You will have the ability to:

Once your CPL has been sent, view up-to-date Conditional Payment Summaries on the MyMSP tab of the website.

And

- View Claim Status.
- Order duplicate Medicare Summary Notices (MSN) or replacement Medicare cards.
- View enrollment information.

F.Y.I! Please keep your sign-in ID and password safe!

If you allow your attorney or representative to have access to your information via MyMedicare, be sure to change your pin once the necessary information has been retrieved.



www.msprc.info

Rights and Responsibilities Brochure

Checklist

For any future cases, the COBC will need the information listed below in order to get the process started.

Beneficiary Information

- ✓ Beneficiary's Name
- ✓ Beneficiary's Date of Birth
- ✓ Beneficiary's Gender
- ✓ Beneficiary's Address
- ✓ Beneficiary's Telephone Number
- ✓ Beneficiary's Medicare Number



- ✓ Date of Injury OR Date of First Ingestion/Exposure
 - *Date of First Ingestion/Exposure is required when you have taken a medication that has resulted in injury or you have been exposed to a product, like asbestos, that has resulted in injury.*
- ✓ Description of Injury
- ✓ Type of Claim— Liability Insurance, No-Fault Insurance or Workers' Compensation
 - *Include both the name and address of the Insurer or Workers' Compensation Entity.*

Representative/Attorney Information

- ✓ Representative/Attorney Name
- ✓ Law Firm Name, if your representative is an attorney
- ✓ Address
- ✓ Telephone Number
- ✓ Proof of Representation - send to the MSPRC immediately after contacting the COBC

Contact the MSPRC

By Telephone



Monday- Friday,
8:00am-8:00pm, Eastern Time
1-866-677-7220 OR
1-866-677-7294 (TTY/TDD)

By Mail



MSPRC Auto/Liability
PO Box 33828
Detroit, MI 48232-5828

Workers' Comp. MSP Recovery
MSPRC WC
PO Box 33831
Detroit, MI 48232-5831

By Fax



1-734-957-0998

Request a call back



Visit the MSPRC website to schedule a call back.

www.msprc.info

Contact the COBC

By Telephone



Monday - Friday
8:00am-8:00pm, Eastern Time
1-800-999-1118
1-800-318-8782 (TTY/TDD)

By Mail - General Inquiries



MEDICARE- Coordination of Benefits
P.O. Box 33847
Detroit, MI 48232 - 5847



Medicare Secondary Payer Recovery Contractor

The MSPRC is committed to serving the Medicare community by improving your knowledge of our recovery process.

- Liability Insurance
- No-Fault Insurance
- Workers' Compensation



www.msprc.info

Checklist for Defense Counsel

- **Discuss early and often with opposing counsel**
- **Include in discovery**
 - Pre-suit questionnaire
 - Written discovery requests
 - Deposition of plaintiff(s)
- **Query COBC system**
- **Include in Scheduling Orders**
- **Consent to Release**

Written Discovery Ideas

- **Medicare**
 - Copy of card
 - Whether claim has been reported
 - Copy of conditional payment letter

- **Social Security Disability**
 - Currently receiving
 - Applied
 - Appealing

Consent to Release Form

MODEL LANGUAGE

CONSENT TO RELEASE

The language below should be used when you, a Medicare beneficiary, want to authorize someone other than your attorney or other representative to receive information, including identifiable health information, from the Centers for Medicare & Medicaid Services (CMS) related to your liability insurance (including self-insurance), no-fault insurance or workers' compensation claim.

I, _____ (print your name exactly as shown on your Medicare card) hereby authorize the CMS, its agents and/or contractors to release, upon request, information related to my injury/illness and/or settlement for the specified date of injury/illness to the individual and/or entity listed below:

CHECK ONLY ONE OF THE FOLLOWING TO INDICATE WHO MAY RECEIVE INFORMATION AND THEN PRINT THE REQUESTED INFORMATION:

(If you intend to have your information released to more than one individual or entity, you must complete a separate release for each one.)

Insurance Company Workers' Compensation Carrier Other _____
(Explain)

Name of entity: _____

Contact for above entity: _____

Address: _____

Telephone: _____

CHECK ONE OF THE FOLLOWING TO INDICATE HOW LONG CMS MAY RELEASE YOUR INFORMATION (The period you check will run from when you sign and date below.):

One Year Two Years Other _____
(Provide a specific period of time)

I understand that I may revoke this "consent to release information" at any time, in writing.

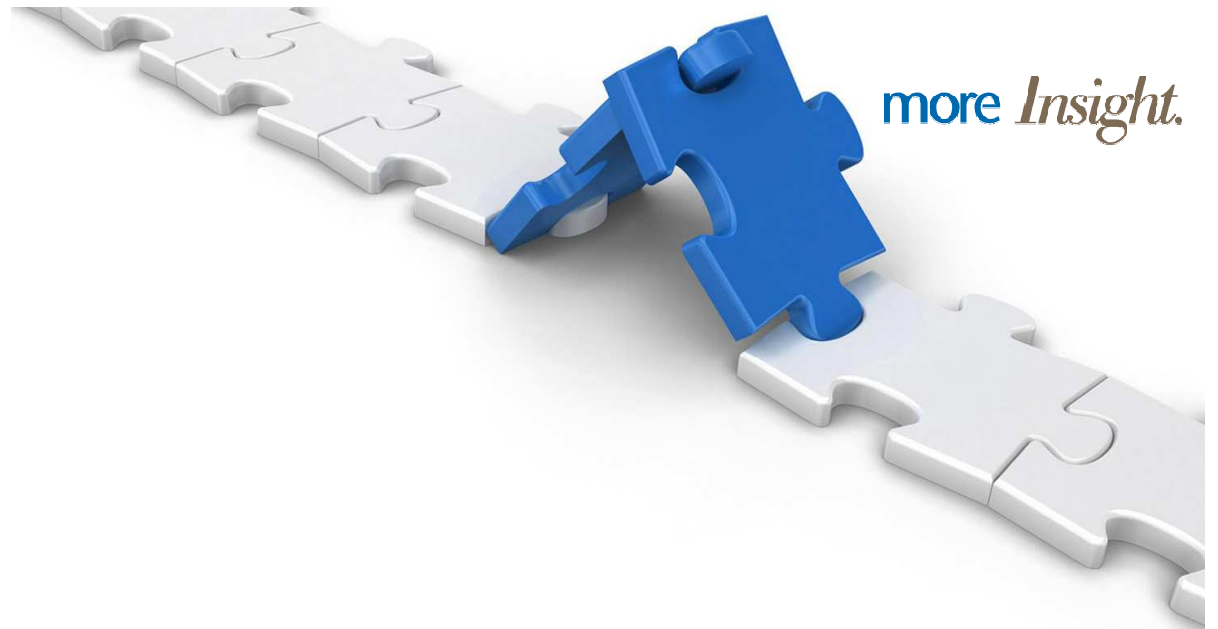
MEDICARE BENEFICIARY INFORMATION AND SIGNATURE:

Beneficiary Signature: _____ Date signed: _____

Note: If the beneficiary is incapacitated, the submitter of this document will need to include documentation establishing the authority of the individual signing on the beneficiary's behalf. Please visit www.msprc.info for further instructions.

Medicare Health Insurance claim Number (The number on your Medicare card.): _____

Date of Injury/Illness: _____



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Dealing with Conditional Payments

Dealing with Conditional Payments

- **First step to resolving a case involving Medicare**
- **Conditional Payment Letter (“CPL”)**
 - MSPRC
 - Medicare Secondary Payer Recovery Contractor
 - Approximately 65 days after Rights & Responsibilities Letter

Conditional Payment Letter



Learn about your letter at www.msprc.info

Learn about your letter at www.msprc.info

Learn about your letter at www.msprc.info

insert name
insert address 1
insert address 2
insert city, state, zip code

Beneficiary Name: insert name
Medicare Number: insert HICN
Case Identification Number:
Date of Incident: insert DOI

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

Dear insert name:

If we know you have an attorney or other individual representing you in this matter, we are sending him/her a copy of this letter. If you have an attorney or other representative for this matter and his/her name is not shown as a "cc" at the end of this letter (indicating that he/she is receiving a copy), please contact us immediately. If you have any questions regarding this letter and are represented by an attorney or other individual in this matter, you may wish to talk to your representative before contacting us.

This letter follows a previous letter notifying you/your attorney of Medicare's priority right to recovery as defined under the Medicare Secondary Payer provisions. Because you were involved in an automobile, slip and fall, medical malpractice, or some other type of liability claim, the medical expenses are subject to reimbursement to Medicare from proceeds received pursuant to third party liability settlements, awards, judgments, or recovery.

However, we request that you/your attorney refrain from sending any monies to Medicare prior to submission of settlement information and receipt of a demand/recovery calculation letter from our office. This will eliminate underpayments, overpayments, and/or associated delays.

As of the date of this letter, Medicare has identified _____ in conditional payments that we believe are associated with your claim, based upon the available information. You/ your attorney will find a listing of claims that comprise this total as an attachment to this letter. Please review this listing and inform us if you/ your attorney disagree with the inclusion of any claim, along with an explanation of why you/ your attorney disagree. If you/ your attorney believe this listing to be incomplete or inaccurate, please include a description of the injury with other correspondence so that your claims may be accurately identified.

Please note: If the underlying claim involves ingestion, exposure, implantation, or other non-trauma based injury, this conditional payment amount will need to be revised. Please contact the MSPRC immediately with a description of the injury so that we may associate the appropriate claims with the case.

We have posted this conditional payment information under the "MyMSP" tab of the www.mymedicare.gov website. The information at www.mymedicare.gov will be updated weekly with any changes or newly processed claims. If you wish, you may track the medical expenses that were paid by Medicare, and if you have an attorney or other representative, provide him/her with this information. This may help you/ your attorney with finalizing your settlement.

Please be advised that we are still investigating this case file to obtain any other outstanding Medicare conditional payments. Therefore, the enclosed listing of current conditional payments (including a response of zero amount) is not a final listing and will be updated once we receive final settlement information from you. It is in your best interest to keep Medicare's payments and the statutory obligations to satisfy Medicare in mind when the final dollar amount is negotiated and accepted in resolution of this claim with the third party.

If the case has settled, please furnish our office with a copy of:

- 1) The settlement agreement from the third party payer showing the total amount of the settlement, signed and dated, AND
- 2) Your closing statement reflecting the actual amount of the attorney's fees and cost (excluding medical bills)

If you have any questions concerning this matter, please call the Medicare Secondary Payer Recovery Contractor (MSPRC) at 1-866-677-7220 (TTY/TDD: 1-866-677-7294 for the hearing and speech impaired) or you may contact us in writing at the address below. When sending any correspondence please provide the Beneficiary Name, Medicare Health Insurance Claim Number (the number on the Medicare card), and Case Identification Number (if known). This will allow us to associate the correspondence to the appropriate records.

MSPRC NGHP
PO Box 138832,
Oklahoma City, OK 73113

Sincerely,

MSPRC

insert cc:

Enclosures: Payment Summary Form

SGLLCPNGHP

SGLLCPNGHP

SGLLCPNGHP

Payment Summary Form

Payment Summary Form

Contractor:
Beneficiary Name: JOHN DOE
Beneficiary HICN: 123-45-6789A
Case ID:
Case Type: Liability
Date of Incident: 2/22/2010

TOS	ICN	Processing Contractor	Provider Name	Diagnosis Codes	From Date	To Date	Total Charges	Reimbursed Amount	Conditional Payment	
71	661110000000	630	JONES, AMELIA	8820	3/15/2010	3/15/2010	\$48.00	\$24.90	\$24.90	
71	661110000000	630	MENDELSON, JOHN	7231, 7194	4/16/2010	4/16/2010	\$60.00	\$29.29	\$29.29	
71	661110000000	9102	GREEN, ADAM S	78900, 95912	2/22/2010	2/22/2010	\$216.00	\$48.87	\$48.87	
71	591010000000	9102	GREEN, ADAM S	78900, 95919	2/22/2010	2/22/2010	\$219.00	\$44.65	\$44.65	
71	661110000000	630	MENDELSON, JOHN	71941, 7231	3/8/2010	3/8/2010	\$130.00	\$73.68	\$73.68	
71	661110000000	630	MENDELSON, JOHN	71941, 7231	3/8/2010	3/8/2010	\$78.00	\$26.66	\$26.66	
71	661110000000	630	MENDELSON, JOHN	71941, 7231	3/8/2010	3/8/2010	\$70.00	\$21.28	\$21.28	
71	661110000000	630	BAILEY, CHARLES M	7394, 7246, 7291, 7392	6/16/2010	6/16/2010	\$45.00	\$27.18	\$27.18	
71	661110000000	630	JONES, AMELIA	8820	3/8/2010	3/8/2010	\$90.00	\$44.27	\$44.27	
40	211060000000	130	GREENCASTLE PHYSICAL THERAPY SPORTS MEDICINE	7242, 71941	12/16/2010	12/16/2010	\$71.00	\$53.65	\$53.65	
40	211060000000	130	GREENCASTLE PHYSICAL THERAPY SPORTS MEDICINE	71941, 7231	3/26/2010	3/26/2010	\$99.00	\$73.37	\$73.37	
Sum of Total Charges:							\$1,128.00	Total = \$93.52		
Total Conditional Payment:							\$467.80			

Checklist for Plaintiff's Counsel

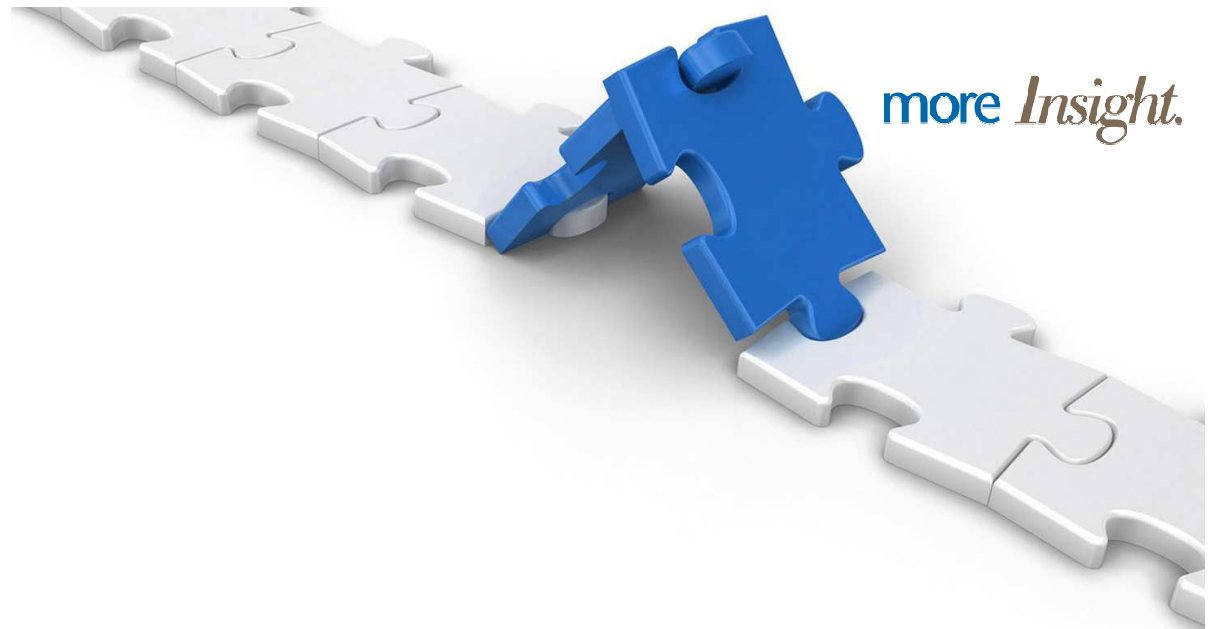
- **Review CPL carefully**
- **Dispute all unrelated charges**
 - Beneficiary only
- **Share CPL and updated CPL with defense counsel**
- **If appropriate, retain lien specialist**
 - Dispute conditional payments
 - Consider future interest

Checklist for Plaintiff's Counsel

- **Self-Calculated Payment Option**
 - \$25,000 or less
 - Treatment Complete
- **Fixed Percentage Option**
 - \$5,000 or less
 - Flat 25% of total settlement
- **Additional requirements for both**
 - Forms & details at www.msprc.info

Checklist for Defense Counsel

- **Review CPL and Payment Summary Form**
- **Communicate with Plaintiff's counsel**
 - Need to address reimbursement
 - Raise unrelated treatment
- **Negotiation Planning**
 - How to address in offers
 - How payment to Medicare will be handled



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Considering Medicare's Future Interest

Medicare's Future Interest

- **Second component to resolution**
- **Will plaintiff require future treatment?**
 - Medicare's secondary payer status
- **No clear rules for liability claims**
 - Different from work comp context
- **Risk to plaintiff is loss of future benefits**

Medicare's Future Interest – Simple Case

- **Acute injury treated and resolved**
- **No reasonable expectation of future treatment**
 - Written certification by treating physician
- **No allocation**
- **Show work in Release**

Medicare's Future Interest – More Complex Cases

- **Reasonable expectation or in dispute**
- **Would Medicare even cover the expenses**
- **Consider using lien specialist**
 - Both sides to ensure reasonable number

Medicare's Future Interest – More Complex Cases

- **Informal Allocation**
 - Plaintiff may chose not to allocate
- **Medicare Set-Aside Arrangement (“MSA”)**
 - Formal
 - Unlike work comp, no approval system
- **Show work in Release**

Medicare's Future Interest

- **Help on the horizon?**
 - June 2012 ANPRM
 - 7 options Medicare is considering for future interest
 - To give finality to process
 - Several options place burden on beneficiary
 - Deadline for comment expired August, 2012



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Addressing MSP in Settlements/Releases

MSP in Settlements/Releases

- **Much easier done upfront than backing into it later**
- **Importance of Advance Preparation**
 - Both sides informed
 - Both side prepared to address explicitly
 - Open and candid communication

Addressing MSP in Release Language

- **Keys**
 - Medicare status
 - Conditional payments
 - Future Interest
 - Indemnity/Hold Harmless
- **Don't forget the spouse**
- **Four general categories**
 - Each builds on previous language

Not a Medicare Beneficiary

- **Status**

- Claimant hereby warrants and represents that she is not currently, nor has been, enrolled in the Medicare program and that none of the health care treatments she has received for the actual or potential injuries arising out of or related to the Incident were **submitted to, were paid by, or may be paid** by Medicare.

- Material term of settlement
 - For all releases

- **Indemnity & Hold Harmless**

Medicare Beneficiary, No Conditional Payments

- **Release personal cause of action under MSP**

- **Identify Status**
 - Medicare Number
 - MSPRC Case Information Number

- **Attach CPL showing no payments**
 - According to the _____ letter received from Medicare, a copy of which is attached as Exhibit 1 hereto, Medicare has not made conditional payments related to the Incident and does not have a claim for reimbursement under the Medicare Secondary Payer Statute.

Medicare Beneficiary, No Conditional Payments

- **No reasonable expectation of future treatment**
 - Claimant has advised and warranted to Defendant that Medicare has not paid, nor is expected to pay, any of her medical expenses arising out of or related to the Incident. Therefore, no allocation for Medicare-covered treatments is required or being established.
- **If CMS changes mind on conditional payments or futures, plaintiff agrees to satisfy**
- **Indemnity & Hold Harmless**

Medicare Beneficiary with Conditional Payments, No Futures

- **Attach current CPL and identify current total**
 - In the _____ letter received from Medicare, a copy of which is attached as Exhibit 1 hereto, Medicare asserts that it has made \$_____ of conditional payments related to the Incident and has a claim for reimbursement under the Medicare Secondary Payer Statute.
 - Use the most current total and request an updated CPL if necessary.

Medicare Beneficiary with Conditional Payments, No Futures

- **How Medicare will be reimbursed**
 - One check to plaintiff/counsel
 - They pay Medicare and provide documentation
 - One check to plaintiff/counsel & Medicare
 - Separate checks to plaintiff/counsel & Medicare
 - CPL total + 10%
- **Make sure language is clear so each side knows what to do/expect.**

Medicare Beneficiary with Conditional Payments, No Futures

- **Medicare's Future Interest**
 - Language similar to previous category
 - Attach treater's certification, or
 - Explain why no reasonable expectation
 - Acute injury
 - Sworn testimony by plaintiff and/or treater

- **Disputed Future Interest**
 - Plaintiff chooses not to allocate
 - Make it clear in release

Medicare Beneficiary with Conditional Payments & Futures

- **Address future interest**
 - Allocation
 - MSA

- **Allocation/earmark**
 - Informal promise to spend on treatment
 - Identify amount and basis for amount
 - Attach lien specialist's opinion letter, or
 - Explain calculation
 - e.g., cost of medication and checkups for X years.

Medicare Beneficiary with Conditional Payments & Futures

- **Medicare Set Aside Arrangement**
 - Formal account set aside to spend on treatment
 - Adds quite a bit of language to release
 - Attaching documentation of amount is key
 - Lien specialist's opinion letter

Addressing MSP in Release Language

- **Other considerations**
 - **Future benefits**
 - Claimant understands that this Agreement may impact, limit or preclude Plaintiff's right or ability to receive future Medicare benefits related to, arising from, or in connection with actual or potential injuries arising out of or related to the Incident, and nevertheless wishes to proceed with the Agreement.
 - **Confidentiality Clause**
 - **MMSEA reporting**
 - **Cooperation Clause**

Addressing MSP in Release Language

- **Defense Counsel & Model Releases**
 - Client wedded to language
 - Recommend changes anyway
 - Document recommendations
 - Ultimately up to client to make the call

Final Settlement Detail



Learn about your letter at www.msprc.info

Final Settlement Detail Document

Beneficiary Name:
Medicare Number:
Date of Incident:

When a beneficiary receives a settlement, judgment, award, or other payment, Medicare is entitled to recover associated payments made by the Medicare program. If certain conditions are met, Medicare reduces its conditional payment to take into account a proportionate share of the costs incurred in resolving the beneficiary's claim. See 42 C.F.R. 411.37. In general, the recovery demand must be against the individual or entity that received payment, the costs must have been incurred because the matter was disputed, and the costs must be paid by the individual or entity against whom/which Medicare seeks recovery. There is no proportionate reduction if payment is not in dispute – for example a payment for no-fault insurance.

In order for Medicare to properly calculate the net refund it is due, please supply the information outlined below. This information will also be used to update the beneficiary's records to show resolution of this matter. If you have a representative, this information should be submitted by your representative on his/her letterhead.

Total Amount of the Settlement: _____
Total Amount of Med-Pay or PIP: _____
Attorney Fee Amount Paid by the Beneficiary: _____
Additional Procurement Expenses Paid by the Beneficiary: _____
(Please submit an itemized listing of these expenses)
Date the Case Was Settled: _____ / _____ / _____

This information should be submitted along with a copy of this notice to:

Medicare Secondary Payer Recovery Contractor
MSPRC-NGHP
Post Office Box 138832
Oklahoma City, OK 73113

If you have any questions concerning this matter, please call the Medicare Secondary Payer Recovery Contractor (MSPRC) at 1-866-677-7220 (TTY/TDD: 1-866-677-7294 for the hearing and speech impaired) or you may contact us in writing at the address above. If you contact us in writing, please be sure to include the beneficiary's name and his/her Medicare health insurance claim number.

Final Payment Letter

- **Generated by MSPRC after Detail submitted**
 - Only addresses conditional payments
 - May be much different from CPL
- **On the clock**
 - 60 days to submit payment
 - 10.375% statutory interest
 - Can still appeal, but pay first
- **Document payment to other side**

Sample Final Demand Letter



Learn about your letter at www.msprc.info

Letter Date

Name
Address 1
Address 2
City, state, zip code

RE: Beneficiary Name:
Medicare Number:
Case Identification Number:
Insurer Claim Number:
Insurer Policy Number:
Date of Incident:
Demand Amount:

Dear _____:

Please note that if we know that you have an attorney or other individual representing you in this matter, we are sending him/her a copy of this letter. If you have an attorney or other representative for this matter and his/her name is not shown as a "cc" at the end of this letter (indicating that he/she is receiving a copy), please contact us immediately. If you have any questions regarding this letter and are represented by an attorney or other individual in this matter, you may wish to talk to your representative and make sure that he/she has received a copy of this letter before contacting us.

We are writing to you because we learned that you have made a liability claim relating to an accident, illness, injury, or incident occurring on or about [MSP Effective Date] and obtained a recovery. We have determined that you are required to repay the Medicare program [Medicare Demand Amount] for the cost of medical care it paid relating to your liability recovery. (The term "recovery" includes a settlement, judgment, award, or any other type of recovery.)

Please read this entire letter, as it contains important information, including:

- An explanation of why you need to repay Medicare and the way we determined the amount you are required to repay (Parts I and II);
- Instructions for repaying Medicare if you agree that there has been an overpayment and accept the amount we have determined you owe. (Part III);
- Instructions for requesting waiver of recovery (for the full or a part of the amount of this demand) or appeal (if you disagree that an overpayment exists or with the amount of the overpayment we have determined you owe). (Part IV). Please note that Medicare will

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Learn about your letter at www.msprc.info

not initiate any recovery action while your request for waiver of recovery or appeal is pending;

- Interest charges that apply if you do not repay Medicare within sixty (60) days from the date of this letter and certain actions Medicare may decide to take if you fail to repay the amount you owe (Part V);
- Whom you should contact if you have questions about this letter (Part VI).

I. Why am I required to repay Medicare?

You are required to repay Medicare because Medicare paid for medical care you received related to your liability recovery. The Medicare Secondary Payer (MSP) law allows Medicare to pay for medical care received by a Medicare beneficiary who has or may have a liability claim. However, the law also requires Medicare to recover those payments if payment of a liability settlement, judgment, recovery, or award has been or could be made. Congress passed the MSP law because it wanted to make sure that the Medicare Trust Funds would have enough money to pay for medical care that beneficiaries may need in the future. Congress decided that, if a liability recovery was available to pay for a Medicare beneficiary's medical care, then that money should be used to pay for the care and any amounts already paid by Medicare should be refunded to the Medicare Trust Funds.

If you would like to read the MSP law, you can find it in Title 42 of the United States Code, Section 1395y(b)(2). You can also find the regulations that explain how the Medicare program recovers amounts it is owed under the MSP law in Title 42 of the Code of Federal Regulations, beginning at Section 411.20. You can also learn more about how the MSP law works by contacting your local Social Security office or by visiting www.medicare.gov.

II. How did Medicare decide how much money I owe?

The Medicare program paid [Medicare Overpayment Amount] for medical care related to your liability recovery. We have enclosed a list of the payments Medicare made related to your recovery with this letter. The Medicare program generally reduces the amount a Medicare beneficiary is required to repay to take into account the costs (such as attorney's fees) paid by the beneficiary to obtain his or her liability recovery. You can find the formula we use to decide how much the amount of this reduction should be at 42 C.F.R., sub-section 411.37. We have applied the formula and determined that the amount you owe Medicare is [Medicare Demand Amount].

This letter relates only to money paid from your current recovery. If, in the future, you receive additional money from this liability recovery, or any other liability recovery, you must let us know.

III. If I accept this determination, how do I repay Medicare what I owe?



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As stated, Medicare has calculated an overpayment of Insert [Medicare Demand Amount], with repayment requested within sixty (60) days of the date of this letter, [Letter Date]. Please send a check or money order for [Medicare Demand Amount] made payable to Medicare, to us at the address listed at the end of this letter. Please make sure to include your name and Medicare number on the check or money order and include a copy of this letter with your payment.

The amount requested in this letter may not include payments received prior to the issuance of this demand letter dated [Letter Date]. Upon issuing a check, please deduct previous payments made to the MSPRC for the above referenced debt.

Please continue reading for information regarding your rights with respect to this overpayment and what happens if you do not repay Medicare timely (including the accrual and assessment of interest).

IV. What rights do I have if I disagree with the amount this letter says I owe or think that I should not have to repay Medicare for some other reason?

Right to Request a Waiver -You have the right to request that the Medicare program waive recovery of the amount you owe in full or in part. Your right to request a waiver is separate from your right to appeal our determination, and you may request both a waiver and an appeal at the same time. The Medicare program may waive recovery of the amount you owe if you can show that you meet both of the following conditions:

1. This overpayment (for purposes of requesting waiver of recovery, the amount you owe is considered an overpayment) was not your fault, because the information you gave us with your claims for Medicare benefits was correct and complete as far as you knew; and when the Medicare payment was made, you thought that it was the right payment;
- AND
2. Paying back this money would cause financial hardship or would be unfair for some other reason.

If you believe that both of these conditions apply to you, you should send us a letter that explains why you think you should receive a waiver of recovery of the amount you owe. If you request a waiver, we will send you a form asking for more specific information about your income, assets, expenses, and the reasons why you believe you should receive a waiver. Medicare will not initiate any recovery action while your request for waiver is pending. If we are unable to grant your request for a waiver, we will send you a letter that explains the reason(s) for our decision and the steps you will need to follow to appeal that decision if it is less than fully favorable to you.

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Sample Final Demand Letter



Learn about your letter at www.msprc.info

Right to Appeal- You also have the right to appeal our determination if you disagree that you owe Medicare as explained in Part I of this letter, or if you disagree with the amount that you owe Medicare ([Medicare Demand Amount]) as explained in Part II of this letter. To file an appeal, you should send us a letter explaining why you think the amount you owe Medicare is incorrect and /or any reason(s) why you disagree with our determination. Medicare will not initiate any recovery action while your appeal request is pending. Once we receive your request, we will decide whether our determination that you must repay Medicare [Medicare Demand Amount] is correct and send you a letter that explains the reasons for our decision. Our letter will also explain the steps you will need to follow to appeal that decision if it is less than fully favorable to you.

You have 120 days from receipt of this letter [Letter Date] to file an appeal. We must assume that you received this letter within five (5) days of the date of the letter [Letter Date] unless you furnish us with proof of the contrary.

If you do not already have an attorney or other representative and you want help with your request for waiver or appeal, you can have a friend, lawyer, or someone else help you. Some lawyers do not charge unless you win your case. There are groups, such as lawyer referral service that can help you find a lawyer. There are also groups, such as legal aid services, that will provide free legal services if you qualify.

V. What happens if I do not repay Medicare the amount I owe?

If you do not repay Medicare in full by [Due Date], you will be required to pay interest on any remaining balance, from the date of this letter, at a rate of [Interest Rate] per year as determined by federal regulation. If the debt is not fully resolved within 60 days of the date of this letter, interest is due and payable for each full 30 day period the debt remains unresolved. By law, all payments are applied to interest first, principal second. You can find the regulation that explains interest charges at 42 C.F.R., sub-section 411.24(m).

If you choose to appeal this determination or request a full or partial waiver of recovery, you may wish to repay Medicare the full amount or the amount you believe you owe within sixty (60) days of the date of this letter to avoid the assessment of interest. Interest accrues on any unpaid balance, which may include any amount you are determined to owe once a decision is reached on your request for waiver of recovery or appeal. If you receive a waiver of recovery or if you are successful in appealing our decision, Medicare will refund any excess amounts you have paid. Medicare will not initiate any recovery action while your request for waiver or appeal is pending.

If you can't repay Medicare in one payment, you may ask us to consider whether to allow you to pay in regular installments. If you make installment payments, you should be aware that your payments will be applied to any interest due first and then to the outstanding principal amount.

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Learn about your letter at www.msprc.info

The provisions of the Debt Collection Improvement Act of 1996 apply to Medicare debt. Recovery actions may include collection by Treasury offset against any monies otherwise payable to the debtor by any agency of the United States (for example, tax refunds or federal benefits), among other collection methods. If Medicare intends to take collection action (including referral to Treasury), you will be provided with appropriate notice. This notice will include information concerning appropriate steps to avoid such actions.

VI. Who should I contact if I have questions about this letter?

If you have any questions concerning this matter, please call the Medicare Secondary Payer Recovery Contractor (MSPRC) at 1-866-677-7220 (TTY/TDD: 1-866-677-7294 for the hearing and speech impaired) or you may contact us in writing at the address below. If you contact us in writing, please be sure to include the beneficiary's name, Medicare Health Insurance Claim Number (this is the number found on the beneficiary's red, white and blue Medicare card), and the date of the incident. Providing us with this information will help us respond more quickly to any questions you may have.

Medicare Secondary Payer Recovery Contractor
Liability
PO Box 138832
Oklahoma City, OK 73113

Sincerely,

MSPRC

CC:

Enclosure: Payment Summary Form

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SMART Act of 2012

- **New procedure for determining reimbursement amount**
 - New CMS website
 - Notice of expected date of settlement/judgment
 - Statement of Reimbursement Amount
 - Resolving discrepancies
 - Appeal process for Primary Payers

- **Reimbursement and reporting threshold**

- **MMSEA reporting penalty made discretionary**

- **Relaxed use of Social Security numbers**

- **3-year statute of limitations**



more *Insight.*

Questions?

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