PRACTICAL STRATEGIES FOR MANAGING LIENS AGAINST TORT SETTLEMENTS

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LIEN MGT STRATEGY TOPICS:

- MGT OF ERISA LIEN PROBLEMS
- MGT OF OHIO INS. (NON-ERISA) LIEN PROBLEMS
- MGT OF MEDICARE LIEN PROBLEMS
- MGT OF MEDICAID LIEN PROBLEMS
- MGT OF OH WORKERS' COMP LIEN PROBLEMS
- MGT OF OTHER "PROBLEM" LIENS

ERISA LIEN MGT

- PROBLEM #1: MORE SUBRO THAN SETTLEMENT $
- SOLUTION STRATEGY:
  - Manage client expectations: Victory = pro-rata sharing of $ among ERISA plan, the injured party, and the pi lawyer
  - Full enforcement of lien is ***not*** compulsory under ERISA
  - Only "appropriate equitable relief" authorized by ERISA
    - Argue: not "appropriate" for the ERISA plan to be fully-reimbursed, while injured party receives little or nothing
    - Argue: Tort claim will be abandoned if no pro-rata sharing
      - ERISA PLANS NOT AUTHORIZED TO SUE TORTFEASORS
  - *U.S. Airways, Inc. v. McCutchen* (US Sup Crt 2013) "equitable lien by agreement"—look for subro "gaps"

ERISA SUBRO MGT *(con't)*

- PROBLEM #2: NO NOTICE OF ERISA PLAN LIEN
- SOLUTION STRATEGY:
  - Contact ERISA plan when pi file is opened
    - *McCutchen:* Notice of lien is by very *existence* of Plan
  - At settlement of pi claim, need to reach "appropriate" (i.e. fair and equitable) resolution of ERISA lien
  - Don't create "settlement fund" w/o resolving ERISA lien
    - *The Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009) (lien against pi lawyer's IOLTA for disbursed pi settlement)
  - May have to join ERISA plan as Civ.R.19 party in tort suit

ERISA SUBRO MGT *(con't)*

- PROBLEM#3: ERISA PLAN REMOVES SUIT TO FED CT
- SOLUTION STRATEGY:
  - In mo to remand to state crt, argue the action is not alleging ERISA violations by the plan [see 29 U.S.C. §1132(a)(3)]
    - See *Cottrill v. Allstate Ins. Co*., 2009 U.S. Dist. LEXIS 101518 (S.D. Ohio Case No. 2:09-cv-714, decided October 30, 2009)
  - Don't seek judgment against joined ERISA Plan in tort suit
  - Agree not to seek default judgment against ERISA plan
    - The goal is to have available someone from ERISA plan to negotiate down lien at time of settlement of tort claim

ERISA SUBRO MGT *(con't)*

- PROBLEM #4: ONLY SPD BOOKLET PRODUCED
- SOLUTION STRATEGY:
  - After *CIGNA Corporation v. Amara* (US Sup Crt 2011), reimbursement only in SPD is *probably* unenforceable
  - Deny any enforceable "equitable lien by agreement" until Plan produces a "Plan Document," which is separate and apart from the Summary Plan Description (SPD)
  - Always offer *something* to settle an ERISA lien
    - Be diplomatic: "Pigs get fat, hogs get slaughtered"

OHIO (NON-ERISA) SUBRO MGT

- PROBLEM #1: “COMPROMISE” TORT SETTLEMENTS
- SOLUTION STRATEGY:
  - The make-whole doctrine applies by default where the contract does not specify whether the insurer or the insured has first priority to the recovered funds
    - See *N. Buckeye Edn. Council Grp. Health Benefits Plan v. Lawson,* 103 Ohio St.3d 188, 2004-Ohio-4886, at ¶25
  - Regardless of what the insurance contract states, attempt to negotiate a pro-rata sharing of settlement proceeds
  - May have to join subro insurer as Civ.R. 19 party in tort suit

OHIO (NON-ERISA) SUBRO MGT *(con't)*

- PROBLEM #2: NO PAY UNTIL REIMB AGT SIGNED
- SOLUTION STRATEGY:
  - Sign reimb agreement only if required by policy/plan
  - If it is unknown whether policy/plan requires signed reimb agreement, then have client sign "subject to plan/policy provisions and/or Ohio law prevailing"
    - The goal here is to get the benefits timely disbursed w/o giving the policy/plan any additional rights
  - Regardless of what the reimb agreement states, attempt to negotiate a pro-rata sharing of settlement proceeds among the policy/plan, the injured party, and the pi lawyer

OHIO (NON-ERISA) SUBRO MGT *(con't)*

- PROBLEM #3: MED PAY SUBRO SUBMITTED TO INTER-COMPANY ARBITRATION
- SOLUTION STRATEGY:
  - When opening pi file, advise BI and med pay carriers in writing that no payments between them are authorized, and any such payments shall be considered conversion of the client's (and pi lawyer's) funds and viewed to be voluntary, with no binding effect upon the amounts owed to the client
  - Argue that an insured cannot be bound by an inter-company arbitration agreement to which he/she is not a party
  - Join med pay/UM insurers as Civ.R. 19 party in tort suits

MEDICARE SUBRO MGT

- PROBLEM #1: NO TIMELY MEDICARE LIEN AMOUNT
- SOLUTION STRATEGY:
- When opening the pi file of a Medicare recipient, fax the following to Medicare - Data Collections, P.O. Box 138897, Oklahoma City, OK 73113-8897; 405-869-3307: 1) NGHP Correspondence Cover Sheet; 2) CMS Consent to Release form signed by client; 3) CMS Proof of Representation form; and 4) itemization of injuries.
  - Do <u>not</u> join Medicare as a Civ.R. 19 party in tort suit

MEDICARE SUBRO MGT *(con't)*

- PROBLEM #1: NO TIMELY MEDICARE LIEN AMOUNT
- SOLUTION STRATEGY (CON'T):
  - As soon as a final settlement offer is accepted on a Medicare recipients' personal injury claim, the plaintiff attorney should fax the following to Medicare - Data Collections: 1) NGHP Correspondence Cover Sheet; and 2) completed Final Settlement Detail Document, attaching an itemized summary of the "procurement" expenses (i.e. advanced case expenses)
  - If a Medicare recovery demand letter is not received within 60 days, then seek the assistance of an MSP Attorney at HHS Counsel (telephone 312-353-1640) or your local US Attorney

MEDICARE SUBRO MGT *(con't)*

- PROBLEM#2: LIEN "FORMULA" GIVES CLIENT LITTLE
- SOLUTION STRATEGY:
  - Medicare liens can be waived or substantially reduced when it "is in the best interests of the [Medicare] program" and/or when enforcement is "against equity and good conscience."
    - See 42 U.S.C. §1395y(b)(2)(B)(v) and 42 CFR §405.358
    - Form SSA-632 (Request for Waiver) should be submitted to a Medicare recipient's local social security office
  - Seek the assistance of a MSP Attorney at HHS Counsel or local US Attorney office to avoid interest accruing when Medicare reimbursement not paid within 60 days

MEDICARE SUBRO MGT *(con't)*

- PROBLEM #3: MEDICARE ON SETTLEMENT CHECK
- SOLUTION STRATEGY:
  - Plaintiff lawyer should provide a copy of Medicare demand letter to the liability insurer, along with a request for two settlement checks, one payable to claimant, Plaintiff attorney, and Medicare
    - Pursuant to 42 C.F.R. §411.24(h) and (i), claimant, plaintiff lawyer *and* liability insurer each individually liable for reimbursing Medicare
  - Plaintiff lawyer should provide a copy of his/her cover letter enclosing Medicare payment to liability insurer and/or defense counsel

MEDICARE SUBRO MGT *(con't)*

- PROBLEM #4: INSURER WANTS SET-ASIDE ACCT.
- SOLUTION STRATEGY:
  - Currently, there are no statutes, regulations, or federal publications that expressly set forth when and how a Medicare Set-Aside Account is to be established.
    - Currently, all of the CMS-published alerts, memorandums, "toolkits," and answers to Frequently Asked Questions reference Medicare Set-Aside Accounts only in the context of workers' compensation claims—not third party tort liability claims.
  - Just say "no" to a liability insurer's request/demand that a Medicare Set-Aside Account be established in connection with a tort settlement.
    - Involve a MSP attorney or local Assistant U.S. Attorney to satisfy a liability insurer that a Medicare Set-Aside Account is not necessary.

MEDICARE SUBRO MGT *(con't)*

- PROBLEM #5: INSURER WANTS CLIENT'S SS#
- SOLUTION STRATEGY:
  - Effective July 1, 2009, liability insurers are required to "verify" and "report" to CMS whether tort claimants are Medicare-eligible [see ¶ 8 to §1862(b) of 42 U.S.C. §1395y(b)]
  - Effective January 5, 2015, liability insurers are required to report to CMS <u>only the last five digits</u> of a Medicare-eligible claimant's social security number [see CMS Financial Services Group Technical Alert dated November 24, 2014]
    - Disclose last five digits of ss# off the public record
    - Redact ss# in records produced in discovery

MEDICARE SUBRO MGT *(con't)*

- PROBLEM #6: MEDICARE ELIGIBILE AFTER STLMT
- SOLUTION STRATEGY:
  - "Needs-based" Medicare benefits can sometimes be preserved by placing the net proceeds of a tort settlement in a Special Needs Trust.
    - Retain a probate lawyer and/or a lien resolution company to draft the Special Needs Trust and/or to serve as the trustee.
  - Instead of a Special Needs Trust, another option is interruption of need-based Medicare benefits while the recipient "spends-down" the net settlement proceeds.
    - Refer a settling tort claimant to an estate planning lawyer for advice as to what assets are exempt from consideration in determining a person's eligibility for needs-based Medicare.

MEDICARE SUBRO MGT *(con't)*

- PROBLEM #7: MEDICARE ADVANTAGE SUBRO
- SOLUTION STRATEGY:
  - *Care Choices HMO v. Engstrom,* 330 F.3d 786 (6th Cir. 2003): Medicare Advantage Plans have the same reimbursement rights as Medicare ONLY IF their insuring agreements expressly create such contractual rights.
  - Federal regulation amendments in 2005 and 2010 (after *Engstrom)* give Medicare Advantage Plans the same "right" to seek reimbursement as traditional Medicare.
  - Treat Medicare Advantage Plans like a non-ERISA policy/plan, not like Medicare: Try to settle MA subro for a pro-rata share of the tort recovery
    - Join the MA policy/plan as a Civ. R. 19 party-defendant in tort suit

MEDICAID SUBRO MGT

- PROBLEM #1: LIEN "FORMULA" GIVES CLIENT LITTLE
- SOLUTION STRATEGY:
  - Pre-suit requests for compromise of Medicaid liens beyond R.C.5101.58(G)(2) "formula" go to OH Tort Recovery Unit
    - Such requests are sometimes "certified" to the Collections Enforcement Section of the Ohio Attorney General
    - Only Asst. AG in Collections Enforcement Section seem to have—or are willing to exercise—the discretion to compromise Medicaid liens beyond the statutory "formula"
  - Joining ODM (Medicaid administrator in Ohio) as a Civ.R. 19 party in tort suit compels intervention of the Collections Enforcement Section of the OH AG

MEDICAID SUBRO MGT *(con't)*

- PROBLEM#2: MEDICAID + MEDICARE SUBROGATED
- SOLUTION STRATEGY:
  - Medicare subro (federal statute) is going to have "priority" over Medicaid subro (state statute)
    - The pi lawyer and liability insurer are individually liable for reimbursing Medicare, but not Medicaid
    - The goal here is to settle the total amount of Medicare and Medicaid subro for no more than one-third of the settlement
  - In "compromise" settlement cases, timely and equitable resolution of both Medicare and Medicaid subro probably cannot be achieved without intervention of the local U.S. Attorney's office and the Collections Enforcement Section of the OH AG

MEDICAID SUBRO MGT *(con't)*

- PROBLEM #3: US SUP CRT RE: MEDICAID SUBRO
- SOLUTION STRATEGY:
  - Effective October 1, 2014, *Ahlborn* (US Sup Crt 2006) and *Wos* (US Sup Crt 2013) [Medicaid subro only against medical bill portion of tort settlement] were <u>legislatively superseded</u> by §1902(a)(25) of 42 C.F.R. §433.135
    - ODM and county DJFS have a first-priority lien (without notice) against Medicaid recipient's *entire* tort settlement
  - Joining ODM as a Civ. R. 19 interested party in a tort suit can be a catalyst to the equitable resolution of Medicaid liens. Seek judgment against ODM only in response to a rarely-filed counterclaim filed by ODM.

MEDICAID SUBRO MGT *(con't)*

- PROBLEM #4: MEDICAID MANAGED CARE SUBRO
- SOLUTION STRATEGY:
  - Most Ohio Medicaid recipients are now being required to join managed care plans ("MPC") administered by private companies under contract with the State of Ohio.
    - Depending on the MPC contract, the State of Ohio may retain its statutory subro rights or "contract" the subro to the MCP
  - Even when a Medicaid MPC is involved, ODM should be joined initially as a Civ. R 19 interested party in tort actions
    - If it is determined that ODM is not the subrogated interest holder, then a motion can be filed to substitute the MPC for ODM.
    - It will probably be necessary to obtain the MPC contract with the State of Ohio to determine what subro, if any, applies.

OH WORKERS' COMP SUBRO MGT

- PROBLEM # 1: JOIN BWC AS PARTY IN TORT SUIT
- SOLUTION STRATEGY:
  - R.C. 4123.931(B) sets forth a formula for BWC's "sharing" of a tort claimant/worker's attorney fees and case costs.
  - When BWC is joined as a Civ. R. 19 interested party in a tort actions, the "defense" of BWC is usually conducted by "special counsel" appointed by the Ohio Attorney General.
    - Regardless of whether BWC is joined as a party to a tort action, the BWC subrogation unit authorizes a BWC subro settlement.
  - Head lawyer of BWC subrogation unit says don't join BWC

OH WORKERS' COMP SUBRO MGT (con't)

- PROBLEM #2: LIEN FOR FUTURE EXPECTED BENES
- SOLUTION STRATEGY:
  - R.C. 4123.931(E) authorizes establishment of trust to reimburse BWC as future benefits are disbursed
    - Funds in trust can be invested/earn interest to pay subro
    - Any remaining trust funds can revert back to claimant
    - Works well for reimbursing future death benefits that are contingent upon no re-marriage or remaining a student
    - Garretson Firm Resolution Group is equipped to negotiate BWC lien, draft BWC trust, and serve as the trustee

OH WORKERS' COMP SUBRO MGT *(con't)*

- PROBLEM # 3: MO TO REALIGN BWC AS PLAINTIFF
- SOLUTION STRATEGY:
  - Realignment of BWC as a plaintiff gives BWC ability to voluntarily dismiss its subro claims without prejudice, pursuant to Civ. R. 41(A)(1)(a)
    - As a defendant, however, BWC still has the ability to formally waive, compromise, or enforce its alleged subro
  - In opposing realignment of BWC as a plaintiff, argue that interests of claimant/plaintiff and BWC are adverse
    - Civ. R. 19(A)(3) does not state whether subro holder must be joined as a party-plaintiff or party-defendant

HEALTH CARE PROVIDER LIENS

- PROBLEM # 1: REFUSUAL TO BILL HEALTH INS.
- SOLUTION STRATEGY:
  - Many providers and health care facilities are now seeking *full* reimbursement of their bills from patients' tort claims.
    - Join such providers as Civ. R. 19 interested parties in tort suits.
    - Consent for Treatment forms contain broad assignments of rights, including a patient's tort claim for the bill.
  - R.C. 1751.60 states that health care providers *shall* seek compensation *solely* from a patient's health insuring corp.
    - R.C. 1751.60 should preclude providers from obtaining summary judgment that insured patients are liable for paying the full bill.

MEDICAL SERV. FUNDING CO. LIENS

- PROBLEM # 1: "COMPROMISE" SETTLEMENTS
- SOLUTION STRATEGY:
  - Medical service funding companies pay a tort claimant's medical bills in return for a lien against the tort settlement.
    - These companies negotiate confidential reduced payments on medical bills, but then assert liens in the full amounts of the bills.
  - Join medical serv. funding co. as Civ. R. 19 interested party in the tort suit. Seek judgment only if counterclaim.
  - Not forcing a medical serv. funding co. to retain local counsel and incur defense costs will promote compromise.

LAWSUIT FUNDING LOAN LIENS

- PROBLEM # 1: REAL PARTY IN INTEREST DEFENSE
- SOLUTION STRATEGY:
  - Lawsuit funding “loans” are actually high-interest cash advances secured by assignments or liens against anticipated tort settlements projected by the plaintiff lawyer.
  - The existence of such loans is likely discoverable by a tortfeasor and support a “real party in interest” defense.
  - Clients rarely approve settlements where they get nothing.
  - Join lawsuit funding companies as Civ. R. 19 interested parties in tort suit, seeking judgment only if counterclaim.

CHILD SUPPORT ARREARAGE LIENS

- PROBLEM # 1: STATUTORY LIEN WITHOUT NOTICE
- SOLUTION STRATEGY:
  - Remind pi clients owing child support: “loose lips sink ships”
  - Manage client expectations: It is a “victory” for a claimant to receive a net recovery of one-third of the gross pi settlement.
  - R.C. 3123.66 and 67 contain no “pro-rata” sharing provision; therefore, non-lawyer county CSEA reps. don’t compromise.
  - If pre-suit resolution efforts are unsuccessful, join the child support enforcement agency as a Civ. R. 19 party in tort suit.
    - The agency’s “defense” will likely be by an asst. county prosecutor, who recognizes “equity” in not forcing abandonment of tort claim.

GENERAL SUBRO PROBLEM MGT

- PROBLEM # 1: SUBRO HOLDER'S MO TO DISMISS
- SOLUTION STRATEGY:
  - In opposing a subrogated interest holder's motion to dismiss, argue that 19(A)(3) compels joinder of parties claiming "an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee."
  - Even if the motion to dismiss is granted, however, you still have a contact person with authority to negotiate down the subro at time of settlement of the tort claim

CONCLUSION

- To successfully resolve pi cases in today's litigation climate, plaintiff attorneys must employ strategies to insure that someone is available with the authority to negotiate down subro at time of settlement of tort claim
- An "appropriate" distribution of a tort settlement in today's pro-subrogation climate is probably when the injured party is receiving no less than one-third of the gross settlement
- Gone are the days of deferring to pi clients whether to contact suspected subrogated interest holders
  - Never let the sleeping subrogation "dogs" lie