

**Liens:
Workers' Compensation,
Medicare, Medicaid,
ERISA & DPW**

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How to Use the CD

Course Materials:

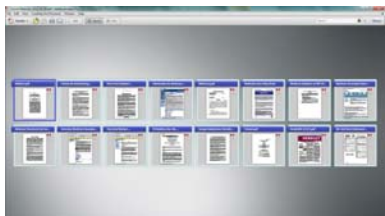
- On the CD or online

Course Materials & Today's Handout:

- Also available in a "portfolio" at:
www.danieljsiegel.com/course_materials.html

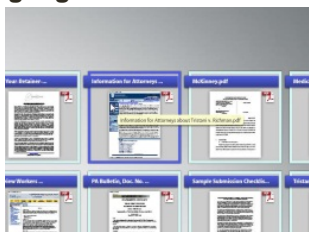
How to Use the CD

- Open the File or Website Link



How to Use the CD

- Highlight the File You Want to See



How to Use the CD

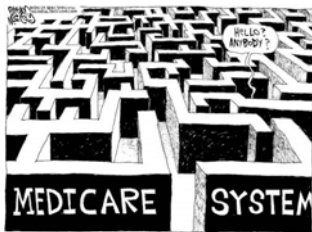
- Double-Click the File to Read It



How to Use the CD

- You Can Also Print or Save the File to Your Own Computer







What, Me Worry?





And the big reason lawyers hate dealing with liens is an inherent conflict of interest. An injured person hired you, yet you are forced to do the work of someone else trying to capitalize on your work.

The New York Personal Injury Law Blog, Eric Turkewitz, <http://www.newyorkpersonalinjuryattorneyblog.com/2010/10/is-the-workers-compensation-lien-really-bulletproof.html>




Ethical Issues:

- Pa. Rule of Professional Conduct 1.15 (“Safekeeping Property”) applies to liens
 - Including “disputed funds”




Ethics Opinions:

- Pennsylvania Bar opinions:
 - 2011-023
 - 2009-063
- Philadelphia Bar opinions
 - 97-1




**Ethics Opinions –
Common Conclusion:**

- Under Rule 1.1 5(b), you are under a duty to notify the lienholder, and to deliver that portion of the settlement proceeds that the lienholder is entitled to receive.




**Ethics Opinions –
Common Conclusion:**

- If the lien or the lienholder’s entitlement to it is in dispute, your duty is to escrow a sufficient portion of the settlement proceeds to satisfy the lienholder’s claim.



**Ethics Opinions –
Common Conclusion:**

- You may not simply release the settlement proceeds to your client with the admonition that the client is under the obligation to repay the lien.




Today's program will:

- Offer tips to help you prepare to and to deal with liens
- Outline in general the types of liens and their impact upon your clients' claims



Some Additional Resources:

- PAAJ Course Materials: "Liens & Subrogation" (Fall 2011)
- Written materials & electronic materials



First:

- Obtain as much information as possible
- Have a thorough intake sheet, and use it

Liens

Information to Obtain:

- Private medical insurance?
 - Name of carrier
 - ID number
 - Named insured
 - Policyholder
- Who pays for the policy?
 - Employer?
 - Privately paid for?

Liens


Information to Obtain:

- Medicare?
 - Through what company?
 - Other coverage?
 - Date of entitlement
 - What types of coverage?
 - Parts A, B, C or D?

Liens


Information to Obtain:

- Medicaid?
- Workers' compensation benefits?
- Veteran's benefits?




Remember, When in Doubt:

- Always read the Rules and Statutes
- Remember that your ethical obligations extend beyond your client and are separate from any statutory or other obligations



Workers' Compensation Benefits:

- Traditional subrogation claim?
- Subrogation is absolute
- Use the Bureau formula
- Keep it simple
- No such thing as automatic 1/3 to each
- May not be equitable
- Some compromises aren't in client's interest
- Based upon net recovery, including fees and costs



Medicare Set-Asides:

- A Medicare set-aside is a fund created in settlement of a personal injury claim (workers' compensation or liability) from part of the settlement to be used to pay future medical expenses that are
 - (a) related to the injury and
 - (b) that would otherwise be payable by Medicare



Medicare Set-Asides:

- A Medicare set-aside is required in the settlement of any workers' compensation case in which future medical benefits are closed and in which the injured worker is – at the time of settlement – eligible for Medicare benefits.




Medicare Set-Asides:

- An MSA is also required in the settlement of any workers' compensation case in which future medical benefits are closed and in which the settlement amount is greater than \$250,000 and in which the injured worker can reasonably be expected to become eligible for Medicare benefits within 30 months of the settlement.



Medicare Set-Asides:


- A person is reasonably expected to become eligible for Medicare within 30 months if at the time of settlement he or she:
 - Is at least 62 and a half years old,
 - Has applied for or been approved for SSD,
 - Has been denied SSD benefits but plans to appeal, or
 - Has end-stage renal disease but does not yet qualify for Medicare.



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Medicare Set-Asides:


- Steps to create an MSA:
 - A determination of the amount of money needed to be placed into the fund.
 - Negotiation of a tentative settlement and preparation of draft settlement documents in the WC case incorporating terms for creation and administration of the MSA.



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Medicare Set-Asides:


- Steps to create an MSA:
 - Obtaining approval from the Centers for Medicare and Medicaid Services (CMS) of the settlement and the proposed MSA.
 - Finalizing the settlement.
 - Funding the MSA.



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ERISA:


- The Employee Retirement Income Security Act of 1974 (ERISA) ensures proper administration of private (non-governmental) pension and welfare plans
- ERISA does not specifically provide for subrogation (no specific provision), but it does allow for appropriate equitable relief, through enforcement of the plan, which is a contract.



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ERISA:


- Two types of ERISA health plans: (1) Insured and (2) Self-funded
- This distinction is important because it determines whether the plan is subject to state laws in addition to ERISA (federal law)



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ERISA:


- General rule – ERISA preempts state law in the governance of employee health plans.
- The exception lies in ERISA's savings clause, in which state laws regulating insurance are saved from the sweep of federal preemption.



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ERISA:


- The savings clause greatly narrows the scope of ERISA preemption where health insurance carriers are concerned.
- Claims based on an employee health plan purchased through a health insurance carrier are governed by both state law and ERISA.



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ERISA:


- Self-funded ERISA plans are not subject to state law because they are not deemed an insurance company, but health insurance carriers and insured ERISA plans are subject to state law.
- This is because when an insured plan asserts a lien against a personal injury settlement, it is the insurer not the plan that is attempting to recoup its expenses.



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ERISA:


- Focus should be:
 - (1) The plan language and then
 - (2) The reimbursement agreement, if any.
- Exceptions to the ERISA rule include government employee plans (federal, state, and local) and church employee plans.



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ERISA:


- ERISA preempts any state law that "relates to" an employee-benefit plan. For example, ERISA preempts a State's anti-subrogation law that otherwise would apply.
- Although ERISA's preemption provision has an exception for insurance law, it allows only regulation of insurance companies and an insurer's contracts.



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ERISA:


- "Stop-Loss" – If the Plan benefits were both partially funded and partially insured, this is a "stop-loss" coverage situation.
- Every court has rejected the idea that stop-loss insurance turns an employer's plan into an insured plan.



Liens

Welfare/DPW/Medicaid:


- When Pennsylvania DPW has made Medical Assistance (MA) expenditures as a result of injuries by another person, an attorney has an obligation to provide DPW with notice of institution of legal proceeding and notice of settlement (62 P.S. §§ 1409 and 1409.1).



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Welfare/DPW/Medicaid:


- As a result of amendments to the statutes in 1994 and 2008, civil and criminal penalties could result for lawyer and plaintiff following an attorney's failure to satisfy interest of DPW for reimbursements for MA.



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Welfare/DPW/Medicaid:


- DPW's reimbursement rights are limited:
 - (1) to MA benefits provided by DPW
 - (2) to MA benefits paid "because of an injury for which another is liable"
- Attorneys must check DPW's claim as to MA expenditures because the DPW's records are not always clear or specific about which expenditures were caused by a particular tort and medical records are often overlooked.



Liens

Welfare/DPW/Medicaid:


- DPW's reimbursement rights are limited:
 - (3) only to the person who sustained the injury, NOT his/her family.
- Statute does not apply
 - (1) where other state administered forms of cash assistance were administered while action was pending (e.g., Temporary Aid to Need Families Program; General Assistance)
 - (2) where the right to recover is based on Assigned Claims Plan



Liens

Welfare/DPW/Medicaid:


- Amount of Reimbursement (Fair Share Rule)
 - The amount of reimbursement DPW is entitled to is limited to the portion of the recovery designated for medical expenses (*Arkansas Dep't of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006)).



Liens

Welfare/DPW/Medicaid (Tristani):


- U.S. Dist. Ct. W.D. Pa.
- **Held:** DPW's right to impose liens and to make recoveries of those liens out of the proceeds of the Medicaid recipient's judgment or settlement, pursuant to 62 P.S.A. §§1409(b)(7)(i) and §1409.1(b)(1), is unconstitutional in third-party bodily injury actions under the Supremacy Clause



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Welfare/DPW/Medicaid (Tristani):


- The Court found that to the extent that Pennsylvania's statutes permitted DPW to impose liens on the awards obtained by Medicaid recipients from liable third-parties, they were preempted by the Social Security Act.



Liens


Welfare/DPW/Medicaid (Tristani):

- The Court further concluded that DPW was not without a means to secure its interest in recouping expenses from liable third-parties.
- Pennsylvania law requires a Medicaid beneficiary to provide reasonable notice to DPW when commencing an action for a claim seeking recovery of medical expenses incurred by the Medicaid Program for his or her benefit. See 62 P.S.A. § 1409(b)(5)(iii).




Welfare/DPW/Medicaid (*Tristani*):

- This notice provision allows DPW sufficient time to petition to intervene in the action to prosecute its claim. See 62 P.S.A. § 1409(b)(5)(v).
- Accordingly, DPW remains free to assert its own interest in accordance with Pennsylvania law without violating federal law.




Post-*Tristani*:

- DPW has subrogation rights but it must actively take steps to protect those rights.
- Liens imposed by DPW against settlement awards when DPW has not formally intervened are not valid.




Post-*Tristani*:

- MA beneficiaries have two options:
 - (1) pursue a comprehensive award, which will be subject to DPW's lien up to the amount permitted under *Ahlborn*, or
 - (2) pursue an award excluding any damages attributable to payments made by the Medicaid program.




Post-Tristani:

- Is it a benefit to decline to pursue or protect DPW's claims?
- Will doing so hinder your ability to settle claims?
- What is the impact of *McKinney*?




McKinney:

- Court rejected both parties' calculations of the lien and considered the risks and uncertainties Plaintiffs faced in prevailing on their underlying claim and their probability of recovering past medical expenses in particular. With those considerations, the Court calculated the amount of Plaintiffs' settlement that represents compensation for past medical expenses and determined DPW's compensation.




2008 Legislation (Act 44 of 2008):

- Act 44 establishes a procedure for MA recipients to exclude medical expenses paid by MA from the damages claimed in a court case.
- If a beneficiary decides not to pursue medical expenses paid by MA, then DPW will intervene in the case or sue separately if it is cost-effective to do so.




2008 Legislation (Act 44 of 2008):

- **DPW Position:**
- *Ahlborn* does not limit DPW's recovery when it sues a third party directly under Section 1409(b)(1) of the Act.
- Beneficiaries who elect not to recover medical expenses paid by MA as part of their claim forfeit the right to have DPW's claim reduced based on their attorneys' fees and costs, even if DPW benefits indirectly from their efforts.




2008 Legislation (Act 44 of 2008):

- **DPW Position:**
- A beneficiary may not attempt to recover medical expenses paid by MA in the past, or those medical expenses that will be paid by MA in the future.
- Notice of settlement must still be provided to DPW under Section 1409(b)(5)(iv), notwithstanding the election.



2008 Legislation (Act 44 of 2008):


- **DPW Position:**
- An election not to recover medical expenses paid by MA can be revoked by the beneficiary only with the express written consent of DPW because it is expected that DPW will incur costs to retain counsel and intervene following the election. The beneficiary cannot settle or release DPW's claims against third parties or insurers.



Liens

2008 Legislation (Act 44 of 2008):


- Act 44 places new obligations upon insurers and third parties.
- Liability insurance companies must now establish a direct relationship with DPW's Division of Third-Party Liability and provide DPW with both notice of suit and notice of settlement in any case when they have information indicating that the claimant received MA.



Liens

2008 Legislation (Act 44 of 2008):


- Act 44 requires that a notice of election to not recover MA be given so that DPW has sufficient time to intervene and prosecute the claim itself.
- Section 259.3(h) specifies when notice of an election to not recover MA will be considered unreasonable.



Liens


2008 Legislation (Act 44 of 2008):

- Notice is not reasonable if:
 - It is given after the close of discovery.
 - It occurs prior to the close of discovery if DPW is not given 30 days to intervene in the case before the settlement agreement is executed.

 *Liens*


2008 Legislation (Act 44 of 2008):

- Act 44 does not expressly create procedures for cases settled without litigation.
- DPW will assume that a settlement includes medical expenses paid by MA unless certain circumstances apply.

 *Liens*


2008 Legislation (Act 44 of 2008):

- In a case involving a minor or incapacitated individual, the court order approving the settlement may adjudicate DPW's claim. If agreement cannot be reached with DPW regarding the amount of its claim against a settlement, then the beneficiary can obtain an *Ahlborn* allocation determination by filing an appeal to the Bureau of Hearings and Appeals.

 *Liens*


2008 Legislation (Act 44 of 2008):

- DPW will not assert a claim in a settlement involving a minor or incapacitated person, when the court order approving the settlement expressly adjudicates DPW's claim after reasonable notice and an opportunity to be heard.
- DPW will not assert a claim when the beneficiary is legally incapable of recovering the medical expenses paid by MA.




2008 Legislation (Act 44 of 2008):

- Finally, DPW will not assert a claim against a settlement when both DPW and the settling party have been provided advance notice that the beneficiary's claim does not include medical expenses paid by MA.



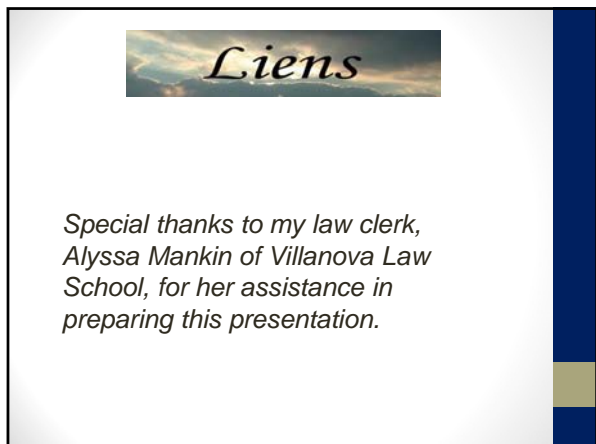
Summary:

- Addressing liens and subrogation remains a complicated area, fraught with dangers. It is always best to do your homework, investigate these claims as early as possible, and advise your clients about the issues so that they are fully informed.
- While this program did not address the ethical pitfalls, you must be mindful of those as well.



And When in Doubt:

- Always read the Rules and Statutes
- Remember that your ethical obligations extend beyond your client and are separate from any statutory or other obligations



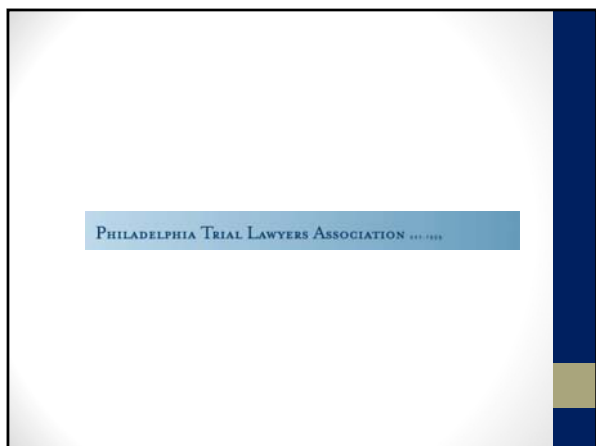
Liens

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