



CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY

EXECUTIVE COMMITTEE MEETING

November 12, 2009 - 10:00 A.M.

**City of Chico
421 Main Street
Counsel Chambers
Conference Room 1
Chico, CA 95928**

(530) 879-7903

AGENDA

I. CALL TO ORDER: 10:00 a.m.

II. ROLL CALL

III. APPROVAL OF MINUTES

- Minutes of the Executive Committee Meeting held on September 8, 2009

IV. PRESENTATIONS

- None

V. CONSENT CALENDAR

- None

VI. THIS TIME IS RESERVED FOR MEMBERS OF THE PUBLIC TO ADDRESS THE EXECUTIVE COMMITTEE ON MATTERS OF EXECUTIVE COMMITTEE BUSINESS

VII. ACTION CALENDAR

1. Status Update on General Manager's Goals & Objectives
2. Committee Appointments
3. Risk Management Issues
4. Succession Planning

VIII. CLOSED SESSION

- None

IX. ACTION ON CLOSED SESSION ITEMS

X. ADJOURNMENT



CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY

EXECUTIVE COMMITTEE MEETING

**September 8, 2009
5:00 P.M.**

**Embassy Suites Lake Tahoe
Echo Meeting Room
4130 Lake Tahoe Blvd.,
South Lake Tahoe, CA 96150**

(530) 544-5400

Minutes

I. CALL TO ORDER:

President Henderson called the meeting to order at 5:10 p.m.

II. ROLL CALL

PRESENT

- | | |
|-------------------------------------|---------------------------------------|
| 1) Jessica Henry, <i>Chico</i> | 5) Kathleen Williams, <i>Stockton</i> |
| 2) Bill Henderson, <i>Livermore</i> | 6) Harry Maurer, <i>Vallejo</i> |
| 3) Janet Hamilton, <i>Lodi</i> | 7) Jeff Tonks, <i>YCPARMIA</i> |
| 4) Chris Carmona, <i>Redding</i> | |

ABSENT

None

OTHERS PRESENT

- | | |
|--------------------------------|---|
| 8) Bob German, <i>CJPRMA</i> | 10) Byrne Conley, <i>Gibbons & Conley</i> |
| 9) David Clovis, <i>CJPRMA</i> | 11) Steve Schwarz, <i>Fremont</i> |

III. APPROVAL OF MINUTES

A motion by Director Maurer, seconded by Director Carmona, to approve the minutes of the Executive Committee meeting held on July 16, 2009, passed unanimously.

IV. PRESENTATIONS

- None

V. CONSENT CALENDAR

- None

VI. THIS TIME IS RESERVED FOR MEMBERS OF THE PUBLIC TO ADDRESS THE EXECUTIVE COMMITTEE ON MATTERS OF EXECUTIVE COMMITTEE BUSINESS

- No one addressed the Executive Committee

VII. ACTION CALENDAR

1. General Manager's Goals & Objectives

The General Manager presented his finalized list of goals and objectives, as approved by the Board of Directors at their meeting of June 18, 2009.

He presented his recommendations for the weighting of each category.

After an extensive discussion, a motion by Director Williams, seconded by Director Hamilton, to approve the proposed weighting of categories, as presented by the General Manager, passed unanimously.

2. Committee Appointments

After an extended discussion, President Henderson appointed the chairs and vice chairs of the standing committees. They are:

Coverage & Claims

Jeff Tonks, Chair

Jessica Henry, Vice Chair

Education & Training

Kathleen Williams, Chair

Janet Hamilton, Vice Chair

Risk Management

Chris Carmona, Chair

Harry Maurer, Vice Chair

President Henderson said that he would discuss board member participation at the October meeting.

VIII. CLOSED SESSION

1. **Government Code Section 54957**
Public Employee Performance Evaluation

Title: General Manager

IX. ACTION ON CLOSED SESSION ITEMS


The Executive Committee completed the evaluation of the General Manager.

X. ADJOURNMENT

The meeting was adjourned at 6:20 p.m.

**CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY**

AGENDA BILL

Item #: 1	<u>Title:</u> STATUS UPDATE ON GENERAL MANAGER'S GOALS & OBJECTIVES
Meeting: 11/12/2009	
Agenda Bill #: 1109	
General Manager: 	

Recommended Action:

None. This item is being provided for informational purposes only.

Item Explanation:

At its meeting of June 18, 2009, the Board of Directors approved the General Manager's goals and objectives for 2009-2010.

Attached, as an exhibit, is a status report on the goals & objectives. The General Manager will be present to discuss them in detail.

Fiscal Impact:

None

Exhibits:

- 1) Status report on General Manager's goals & objectives.

Executive Committee Action:



GENERAL MANAGER GOALS & OBJECTIVES FOR 2009-2010

GOALS	ACTION STEPS	STATUS	TARGET COMPLETION
1. Maintain financial strength and solvency. <p style="text-align: center;">50%</p>	A. Maintain affordable premiums for members.	Liability premiums will be maintained at the current level through 6/2011. Property premiums will be the same for two consecutive years through 6/2011.	
	B. Provide enhanced services at affordable costs.	Open	
	C. Monitor organizational spending for budget compliance.	Ongoing	April 30, 2010
	D. Establish a vendor pool providing discounted services to members.	Open	
	E. Develop a method for comparing programs and services provided by other organizations.	Open	
	F. Monitor, review and evaluate all claims.	Ongoing	
	G. Monitor the use of outside counsel services in order to ensure that they are cost effective and efficient.	Ongoing	
	H. Negotiate settlements that minimize the financial impact on organizational resources.	Ongoing	

GOALS	ACTION STEPS	STATUS	TARGET COMPLETION
<p>2. Establish training programs for Board Members, staff and member entities.</p> <p>10%</p>	A. Identify essential core competencies for Board members and alternates.	Open, To be discussed with Committee.	
	B. Develop a training curriculum focused on identified core competencies.	Open, To be discussed with Committee.	
	C. Conduct New Board Member Orientation twice annually.		December 3, 2009
	D. Establish a process for collecting member loss data.	Open	
	E. Analyze loss data for categorical frequency and severity.	Open	
	F. Develop a comparative analysis for member to member experience.	Open	
	G. Create a training program focused on frequency and severity of losses.	Open, Refer discussion to Training & Education Committee.	
	H. Implement a training program that optimizes member involvement and minimizes impact on member resources.	Open, Refer discussion to Training & Education Committee.	

	I. Evaluate alternative methods for delivery of training programs.	Open, Refer discussion to Training & Education Committee.	
	J. Create training program for professional development of staff.	All staff members attending CAJPA and PARMA Conferences. Additional programs being researched.	

GOALS	ACTION STEPS	STATUS	TARGET COMPLETION
3. Create standards for member Risk Management programs. 15%	A. Develop minimum standards for member Risk Management programs.	To be discussed with Risk Management Committee.	
	B. Develop organizational standards (benchmarks) for comparing member programs.	To be discussed with Risk Management Committee.	
	C. Explore alternative Risk Management programs.	To be discussed with Risk Management Committee.	
	D. Provide enhanced Risk Management services to members.	To be discussed with Risk Management Committee.	
	E. Create a member Risk Management audit policy and procedure.	To be discussed with Risk Management Committee.	
	F. Create a member Risk Management accreditation program.	To be discussed with Risk Management Committee.	
	G. Create model policies and procedures.	Ongoing	
	H. Establish minimum standards for best practices.	To be discussed with Risk Management Committee.	
	I. Provide enhanced communication to members including jury verdicts, legislative developments and other industry related developments.	Open	
	J. Provide enhanced briefings on closing cases.	To commence with December Board Meeting.	December 10, 2009

GOALS	ACTION STEPS	STATUS	TARGET COMPLETION
<p>4. Improve the agenda process by creating policies and procedures for agenda preparation and distribution.</p> <p>10%</p>	<p>A. Create an agenda calendar which addresses dates for development and preparation of agendas.</p>	<p>In Process</p>	<p>December 10, 2009</p>
	<p>B. Increase the amount of background information provided in agenda bills.</p>	<p>Ongoing</p>	
	<p>C. Review preliminary agenda with the Board President at least 14 days prior to each meeting.</p>	<p>Commence in October 2009</p>	

GOALS	ACTION STEPS	STATUS	TARGET COMPLETION
5. Establish a permanent office site with meeting space. 5%	A. Award contracts for construction of improvements.	Complete	
	B. Purchase furniture and equipment for new facility.	Complete	
	C. Relocate staff and equipment to new facility.		February 2010
	D. Sublease/terminate lease for existing office space.	Open until move completed.	
	E. Complete the new facility within allocated budget.		February 2010
	F. Schedule an Open House for new facility.		March 2010
	G. Develop policy for use of the facility by members and outside parties.		March 2010
	H. Provide periodic status updates to the Board and Executive Committee.	Ongoing	

GOALS	ACTION STEPS	STATUS	TARGET COMPLETION
<p>6. Conduct analysis to determine optimum organizational size and explore options for the provision of additional coverages, products and services.</p> <p style="text-align: center;">10%</p>	A. Conduct member survey to identify additional exposures.		February 2010
	B. Evaluate optional coverage programs for common member exposures.		February 2010
	C. Develop an enhanced special event program.	Complete	July 1, 2009
	D. Conduct an actuarial analysis.		March 1, 2010
	E. Create a marketing program based upon organizational needs.	Open	
	F. Identify potential new members, create a priority list, and market accordingly.	Open	
	G. Maintain an organizational size that provides optimal pricing and delivery of services.		March 2010
	H. Develop marketing plan for members and non-members.	Open	

**CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY**

AGENDA BILL

Item #: 2	<u>Title:</u> COMMITTEE APPOINTMENTS
Meeting: 11/12/2009	
Agenda Bill #: 1110	
General Manager: 	

Recommended Action:

None. This item is being provided for informational purposes only.

Item Explanation:

At the Executive Committee meeting, held on September 8, 2009, President Henderson appointed the chairs and vice chairs of the standing committees.

At the Board of Directors meeting, held on October 15, 2009, President Henderson told the Board members to submit their preferences on committee appointments to the CJPRMA office no later than Thursday, October 29, 2009.

President Henderson viewed the requests and made the following assignments:

Coverage & Claims

Jeff Tonks, YCPARMIA, Chair
Jessica Henry, Chico, Vice Chair
Steve Schwarz, Fremont
Jeff Davis, REMIF
Mary Ann Perini, San Leandro
Rob Epstein, San Rafael
Roger Carroll, SCORE

Risk Management

Chris Carmona, Redding, Chair
Harry Maurer, Vallejo, Vice Chair
Dixon Coulter, NCCSIF
Ron Blanquie, Petaluma
Stacy Haney, Roseville
Lynne Margolies, Santa Rosa
Tony Giles, Sunnyvale

Education & Training

Kathleen Williams, Stockton, Chair

Janet Hamilton, Lodi, Vice Chair

Darrell Handy, Alameda

Kim Greer, Fairfield

Robyn Kain, Richmond

Celeste Garrett, Vacaville

Fiscal Impact:

None

Exhibits:

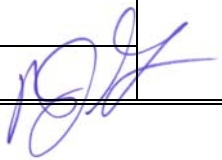
- 1) Committee assignments from President Henderson

Risk Management Committee Action:

AGENCY	NAME	COVERAGE/ CLAIMS	EDUCATION/ TRAINING	RISK MANAGEMENT
Alameda	Darrell Handy		1	
Chico	Jessica Henry	XX		
Fairfield	Kim Greer	3	1	2
Fremont	Steve Schwarz	1		
Livermore	ME	XX	XX	XX
Lodi	Janet Hamilton		XX	
NCCSIF	Dixon Coulter			1
Petaluma	Ron Blanquie	2	3	1
Redding	Chris Carmona			XX
REMIF	Jeff Davis	1		
Richmond	Robyn Kain	2	1	3
Roseville	Stacy Haney			1
San Leandro	Mary Ann Perini	1	3	2
San Rafael	Rob Epstein	1		
Santa Rosa	Lynne Margolies			1
SCORE	Roger Carroll	1	2	3
Stockton	Kathy Williams		XX	
Sunnyvale	Tony Giles	3	2	1
Vacaville	Celeste Garrett	3	1	2
Vallejo	Harry Maurer			XX
YCPARMIA	Jeff Tonks	XX		

**CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY**

AGENDA BILL

Item #: 3	<u>Title:</u> RISK MANAGEMENT ISSUES
Meeting: 11/12/2009	
Agenda Bill #: 1111	
General Manager: 	
<u>Recommended Action:</u>	
None.	
<u>Item Explanation:</u>	
<p>This item is reserved for the discussion of risk management issues that are of concern to the members and for the provision of status updates on the risk management program.</p> <p>Issues that have been requested to be listed for discussion are set forth below.</p> <ol style="list-style-type: none">1) MSA (Robert German, CJPRMA)2) Taser Policies (Robert German, CJPRMA)	
<u>Fiscal Impact:</u>	
None	
<u>Exhibits:</u>	
<ol style="list-style-type: none">1) Article on the Medicare Secondary Payer Act	

Executive Committee Action:

THE MEDICARE SECONDARY PAYER ACT—A DIAMOND IN THE ROUGH!

Richard Neuworth is a partner at Leban & Neuworth, L.L.C. located in Baltimore, Maryland. He also serves on the Maryland Association For Justice's Board of Governors.

Kevin I. Goldberg is a partner in the law firm of Goldberg, Finnegan & Mester, with its main office in Silver Spring, Maryland. He is President-Elect of the Maryland Association For Justice.

One of the greatest obstacles to the efficient settlement of our clients' personal injury and medical malpractice cases is resolving outstanding Medicare liens. Attorneys often complain about the Center for Medicare Services' (CMS) slow response time and its lack of efficiency. Further complicating matters, the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) and the Medicare, Medicaid, and SCHIP Extension Act of 2007ⁱ contain important changes that may suggest that attorneys representing personal injury and medical malpractice claimants will have to set aside portions of the settlement to reimburse Medicare for future accident related payments in the same manner as workman's compensation claimants.ⁱⁱ However, hidden within the morass of headaches that go along with resolving Medicare liens, is a "diamond in the rough"-- an enforcement provision that gives Medicare beneficiaries a private cause of action allowing the beneficiary to sue for double the amount of what Medicare is entitled. This private cause of action is often over-looked by lawyers. It is a tool that lawyers can and should use to increase the value of clients' cases, and to bring about more efficient and timely settlements.

The private cause of action is set forth in 42 U.S.C. § 1395y, and provides:

(A) Private cause of action

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A).

The purpose of the private cause of action statute is to help the government recover conditional payments from insurers or other primary payers, to encourage private parties to

enforce Medicare's rights, and to save money for the Medicare system.ⁱⁱⁱ The premises underlying the MSP private cause of action are: (1) the beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses, (2) without the double damages, the beneficiary might not be motivated to take arms against a recalcitrant insurer because Medicare may have already paid the expenses and the beneficiary would have nothing to gain by pursuing the primary payer, and (3) with the private right of action and the double damages, the beneficiary can pay back the government for its outlay and still have money left over to pay him for his efforts. This Article discusses the history and evolution of the MSP private cause of action, recent case law regarding the private cause of action, and most importantly, how plaintiff attorneys can use the MSP private cause of action to benefit our clients.

I. History And Evolution of the Medicare Private Cause of Action

Congress added the private cause of action to the Medicare Secondary Payer statute in 1986.^{iv} Although there is no specific legislative history explaining the purpose of the private right of action, Courts have concluded that its purpose is to help the government recover its fair share of payments that have been made as a result of tortuous conduct towards Medicare beneficiaries.^v

using
citizens
to help
with
enforcement

The 2003 amendments to the MMA were specifically enacted to overturn previous court decisions that limited the effectiveness of the MSP private cause of action. The 2003 Amendments made it easier for injured Medicare recipients to bring these private actions on behalf of CMS- Medicare against an expanded class of entities and individuals with insurance, and clarified when such entities are required to pay the Medicare beneficiary's medical expenses.

The three critical amendments establish that:

- All businesses, trades or professions shall be deemed to have insurance regardless of whether or not it carries its own risk.^{vi}
- Any judgment or payment conditioned upon the recipient's compromise, waiver or release (whether or not there is a determination or admission of liability) will demonstrate a plan's responsibility to reimburse Medicare.^{vii}
- Reimbursement to Medicare is no longer tied to anticipation of "prompt" payment because the Secretary of Health and Human Services may make conditional payments if a primary plan has not made, or cannot reasonably be expected to make payments with respect to such services promptly.^{viii}

As part of the 2003 amendments, Congress went further and legislated that these amendments would apply retroactively back to the passage of the original Medicare Secondary Payer Act in 1980.^{ix} The 2003 amendments are found in Title III of the MMA,^x and this legislation expanded the possible defendants for the private cause of action to include the tortfeasor (assuming that the tortfeasor is a business, trade or profession without insurance), the tortfeasor's insurance company, and any self-insured employer or third party administrator of a health insurance plan. Whereas prior to the 2003 amendments, it was not clear whether Medicare had a right of reimbursement from certain self-insured defendants, it is now crystal clear that Medicare's right of reimbursement applies to practically all tort settlements in which Medicare payments have been made on behalf of the tort plaintiff.^{xi}

II. Court Decisions Relating to the Private Cause of Action

Court decisions decided since the enactment of the 2003 amendments consistently permit the private cause of action to proceed against insurers and similar entities including employers, who are deemed responsible for the tort victim's injuries. For example, in *O'Connor v. Mayor and City Council of Baltimore*, the Plaintiff brought a MSP private cause of action claim against his employer, Baltimore City. The Plaintiff, Mr. O'Connor, suffered from mesothelioma as a result of being exposed to asbestos during his employment for Baltimore City. As a result of this

illness, he incurred a substantial amount of medical bills. The Maryland Workman's Compensation Commission found that his mesothelioma resulted from his employment, and ordered Baltimore City, which is self insured, to pay his related medical bills. Despite this Order, Baltimore City did not pay the bills, and instead the bills were paid by Medicare. Mr. O'Connor filed a private cause of action for double the amount owed, and Baltimore City filed a motion to dismiss arguing that Mr. O'Connor did not have standing to file suit. The Court denied the motion to dismiss, and explained that "...the MSP statute's citizen suit provision exists to redress exactly this type of injury."^{xii}

Another case, *Brown v. Thompson* does not directly involve the private cause of action, but it provides an excellent example of the expanded class of entities that the MSP private cause of action can now be brought against in light of the changes to the law in 2003. Ms. Brown's health insurance was through Kaiser Foundation Health Plan. She was admitted to the hospital for 42 days with a perforated colon. Ms. Brown filed suit against Kaiser for medical malpractice alleging that the Kaiser doctors failed to promptly admit her to the hospital. The medical bills for the hospitalization were paid by Medicare. The medical malpractice lawsuit against Kaiser settled for \$285,000.00. Medicare asserted a lien for recovery of its payments.

Ms. Brown's attorney filed a declaratory judgment action regarding whether Medicare was entitled to assert a lien on the settlement proceeds, and argued that the Medicare lien was invalid because: (i) when the Medicare payments were made, there was no expectation of prompt payment from Kaiser, and (ii) Kaiser did not qualify as a "primary plan." The Court held that Medicare's lien was valid, and explained that the 2003 amendments to the MMA clarify that Medicare's right to reimbursement is not conditioned upon prompt payment, and that the 2003 amendments also clarify that Kaiser qualifies as a self insured "primary plan."

This case is important to lawyers asserting the private cause of action on behalf of their clients because it provides a practical example of the expanded class of the defendants that the MSP private cause of action can be brought against. In fact, the United States Court of Appeals for the Federal Circuit, in *Telecare Corp. v. Leavitt* held that Medicare can even assert its rights against an employer that sponsors or contributes to a group health plan.^{xiii} Since Medicare has the right to assert its rights against such employers, our clients who have been injured also have the right to pursue the MSP private cause of action for double damages against such entities.

Other court cases since the 2003 amendments have held that the private cause of action is not a *qui tam* action, and that it therefore can only be brought by the individual who was injured and whose medical bills were paid by Medicare.^{xiv}

III. Using the Private Cause of Action To Benefit Our Clients

It is important that lawyers representing tort victims understand the MSP private cause of action, and consider how and when to best use it as a tool to advance their clients' interests. Before a case goes to trial, lawyers need to consider whether using the threat of a Medicare Secondary Payer private cause of action lawsuit would increase the settlement offer, or bring a reluctant defendant to the settlement table. Lawyers should keep in mind that the MSP private cause of action can be brought as a separate count in a personal injury lawsuit, or it can be brought after a judgment is obtained against the tort defendants. The timing of when the MSP private cause of action should be brought depends on the facts and circumstances of the particular case.

A. Using the MSP Private Cause of Action as a Tool In Negotiating Settlements of the Underlying Tort Claim

When writing a demand letter to the insurance company or defense attorney, lawyers should consider including a citation to the MSP statute, with an explanation that the medical

economic loss exposure is actually double the amount of the medical bills. Adjusters, mediators, and even most defense attorneys, do not understand the scope of exposure under the MSP private cause of action, and it is our obligation to educate our adversaries about the double exposure, and how the recent amendments to the MSP statute and court cases expand the class of entities with direct exposure to damages beyond the tortfeasor. In fact, almost any public or private entity and their individual employees acting in the scope of their employment can be sued for all acts of negligence to the extent of their liability insurance coverage resulting in any medical expenses paid by Medicare. As a result of the recent amendments to the Medicare Secondary Payer law, those with direct exposure certainly now include liability insurance carriers, health insurance companies, HMO's, nursing homes, third party administrators, and employers of Medicare beneficiaries.

Insurers will not reserve for the MSP claims unless the attorney(s) educate them about consequences of not only losing the underlying action, but also the prospect of having to defend against a second lawsuit for double damages concerning the medical expenses. In certain cases, this factor alone will force the insurance company to consider making a policy limits offer. Including a MSP private cause of action claim in a demand letter can also bolster a bad faith claim in the event that the insurance company does not make a reasonable settlement offer within policy limits and an excess verdict is obtained. In the subsequent bad faith lawsuit, the plaintiff can use the fact that the adjuster and/or defense attorney failed to consider the double damages allotted to the MSP private cause of action as evidence that the insurance company did not properly evaluate the claim.

Proper use of the MSP private cause of action during settlement negotiations with the insurance company can force an insurance company to make a settlement offer in a disputed

liability case that otherwise would have been denied. Below are examples of how practitioners can use the Medicare Secondary Payer Act in medical malpractice cases and general personal injury cases.

(i) Medical Malpractice Cases

A lawsuit pursuant to the Medicare Secondary Payer Act's private cause of action statute should be considered in any medical malpractice case in which the injured victim is a Medicare beneficiary by the time that a verdict is rendered. Since almost all nursing home patients are over age 65, Medicare has a lien on almost all tort recoveries resulting from medical malpractice at nursing homes. When the nursing home and its insurance carrier fail to accept financial responsibility for the injuries resulting from their negligent acts, and instead allow Medicare to pay for future care that is the result of the nursing home staff's negligence, not only is the nursing home depriving the plaintiff of the compensation that he is entitled to, but the nursing home is also unknowingly exposing itself to liability for double the amount paid for future care expenses by Medicare. For example, assume that a nursing home patient develops stage III decubitus ulcers as a result of the nursing staff's failure to follow well-established guidelines. As a result of the nursing home's negligence, the patient requires several surgical procedures and advanced levels of care that would not have been necessary but for the negligence. Medicare pays \$100,000.00 in medical bills for the surgical procedures and aftercare/rehabilitation relating to the wounds. The patient eventually hires an attorney to pursue the medical malpractice claim. The attorney sends a demand letter to the nursing home and its insurance carrier. The insurance carrier denies the claim alleging that the nursing home staff was not negligent. The case proceeds to trial, and the jury finds in favor of the plaintiff and awards \$750,000.00, including \$100,000.00 for medical expenses relating to treatment of the ulcers. The nursing home patient

could now bring a second lawsuit against the nursing home and its insurer for an additional \$200,000.00—double the amount of medical expenses paid by Medicare for the treatment of the ulcers—pursuant to the MSP's private cause of action statute. Attorneys may want to reconsider nursing home cases that were rejected because of lack of non-economic loss, and/or lack of permanent injury. The possible damages in those cases are not just the amount of the medical bills, but actually double the amount of the actual medical bills paid by Medicare.

Medical malpractice attorneys representing injured Medicare beneficiaries need to understand this private cause of action, and use it effectively as a negotiating tool, and if the case goes to trial, as an opportunity to obtain further compensation for the client. In cases that go to verdict, at a minimum, attorneys should be advising their clients of the existence of their MSP private cause of action claim.

(ii) General Personal Injury Cases (Auto Accidents and Premises Liability Cases)

An example of how the Medicare Secondary Payer Act's private cause of action is implicated in general personal injury cases is set forth in the following example. A 68 year-old adult is injured in an automobile accident, and he or she undergoes numerous surgical procedures. The victim then goes to a rehabilitation center for several months to recuperate, and learns how to take proper care of the injuries. The claimant incurs \$250,000.00 in medical expenses for the extended hospital stay, surgeries and rehabilitation costs. These medical bills are paid by Medicare. The driver of the vehicle who struck the victim has one million dollars (\$1,000,000.00) in liability insurance coverage. Some states have caps on non-economic damages that are far less than the policy limits in this example. Taking into consideration the forum state's cap on non-economic damages, and its potential exposure in the case, the liability insurance carrier for the driver of the vehicle who struck the victim makes an extremely low

settlement offer reasoning that because of the cap on non-economic damages, that any potential verdict will certainly fall within the \$1,000,000.00 policy limits. An attorney takes the case to trial, and the verdict amount is \$915,000.00, an amount that is more than the insurance carrier had hoped to pay, but that is still within its insured's policy limits. The insurance company pays the \$915,000.00 verdict, and assumes that the matter is resolved.

After receiving this payment, the injured person could then bring a second cause of action pursuant to the Medicare Secondary Payer Act for an additional \$500,000.00 (double the amount paid by Medicare) against the tortfeasor and the liability insurance company. If the insurance company had been made aware of its exposure under the Medicare Secondary Payer Act, and taken this secondary cause of action into consideration before the trial, it most certainly would have had to make a more reasonable settlement offer before trial because its exposure is actually well in excess of its insured's policy limits. The point is that it is incumbent upon all personal injury attorneys to make insurance carriers aware of this secondary exposure, and use this possibility as a tool to increase the likelihood of obtaining a fair settlement offer.

Another example in the general personal injury context is as follows: An elderly Medicare beneficiary is involved in a car accident in a conservative venue in which liability is disputed by the liability carrier. The injuries are essentially soft tissue without any permanency. Assume that the alleged tortfeasor defendant has only \$20,000.00 of liability coverage. If the accident related medical bills paid by Medicare are \$10,000.00, then the insurance company can deny the claim believing that even if they lose on liability, there is little risk to their insured of a verdict in excess of the \$20,000.00 insurance policy. However, if the insurance adjuster is made aware that their exposure on the bills alone pursuant to the MSP private cause of action is actually for double the amount of the medical bills (\$20,000.00), then the adjuster will realize

that if the plaintiff's case succeeds, the verdict realistically will exceed the \$20,000.00 liability policy limits. The point is that when the MSP private cause of action's double damages provision is factored into the insurance adjuster's evaluation of the plaintiff's claim, the adjuster is much more likely to attempt to get the case settled even though liability is disputed. Moreover, and as stated earlier, reference to the MSP private cause of action in the demand letter can bolster a subsequent bad faith claim.

As a result of the expanded number of entities that can be sued, certain types of personal injury claims should become more valuable. For example, nursing homes that have liability insurance and cause injury to elderly residents, who invariably have Medicare coverage, would be subject to larger recoveries.

B. Statute of Limitations And Other Considerations

Since there is no separate statute of limitations for bringing the MSP private cause of action, lawyers should assume that the forum state's general statute of limitations will apply.^{xv} A word of caution is appropriate at this juncture. If the MSP private cause of action is brought in state court along with the underlying tort claim, it will subject the lawsuit to removal to federal court. Therefore, if you prefer to keep your client's case in state court, you should wait until the underlying tort claim is resolved before proceeding with the MSP private cause of action.

It should be noted that the 11th Circuit held that an alleged tortfeasor's responsibility for payment of a Medicare beneficiary's medical costs must be demonstrated before a MSP private cause of action can correctly be brought.^{xvi} Lawyers should use the MSP private cause of action to bolster their settlement position, and to obtain larger recoveries on behalf of their clients.

If a judgment has been obtained in the underlying tort action and/or workers compensation case, the MSP private cause of action has other important advantages as contrasted

with other remedies under state and federal personal injury law. For instance, the third party wrongdoer is barred from re-litigating liability issues in any subsequent action brought pursuant to the 2003 amendments based on the doctrine of offensive collateral estoppel when a monetary judgment has been obtained in the underlying tort action at trial, or if a finding of compensability is made by an administrative agency.^{xvii} However, a settlement payment probably does not mean that the underlying action cannot be re-litigated.

IV: Conclusion

The MSP private cause of action has been strengthened by recent congressional legislation, and personal injury lawyers should incorporate the use of its double damages provision to benefit their clients. The sheer number of current and future Medicare beneficiaries and recipients demonstrates how important the MSP private cause of action could be to personal injury and worker's compensation practitioners. Currently, there are forty-one million (41,000,000) beneficiaries in the Medicare health care system. In the next few years, it is estimated that an additional seventy-four million (74,000,000) baby boomers will start entering the Medicare system. These statistics, coupled with the recent changes to the law that strengthen the MSP private cause of action, require that attorneys representing Medicare beneficiaries understand how and when the MSP private cause of action can be used to the benefit of their clients.

ⁱ . This new law will require that insurance companies report all personal injury settlements to the Center for Medicare and Medicaid Services after July 1, 2009. See, 42 U.S.C. 1395y(b)(8).

ⁱⁱ See Trial Magazine, "The Uncertain Future of Medicare Set-Asides," William Winslow, Vol. 44, No. 3 March 2008; and Trial Magazine, "Making Sense of Medicare Set-Asides," Matt Garretson, Vol. ____, No. ____, May, 2006.

ⁱⁱⁱ *Stalley v. Catholic Health Initiatives*, 509 F.3d 517 at 524 (8th Cir. 2007) (discussing the history and purpose of the private cause of action); *Manning v. Util. Mut. Ins. Co.* 254 F.3d 387 (2nd Cir. 2001).

^{iv} Pub.L. No. 99-509, § 9319, 100 Stat. 1874 (1986) (Codified as amended at 42 USC § 1395y(b)(3)(A)).

^v See *Stalley v. Catholic Health Initiatives*, 509 F.3d 517 at 524-25 (8th Cir. 2007) (discussing statute's purpose, historical context and legislative history);

^{vi} 42 USC 1862 (y)(b)(2)(A)

^{vii} 42 USC 1862 (y)(b)(2)(a)

^{viii} 42 USC 1862 (y)(b)(2)(A)(ii)

ix. Public Law 108-173; 117 Stat. 2066

^{*} Public Law 108-173 117 Stat, 2066, 2222

^{xi} See *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004) (explaining that the 2003 amendments establish and clarify the law, and that it is now clear that settlement proceeds in a medical malpractice case from Kaiser to the tort plaintiff were indeed from a "primary plan" under the MSP).

^{xii} *O'Connor v. Mayor and City Council*, 494 F. Supp.2d 372 at 374 (D.MD 2007).

^{xiii} *Telecare Corp. v. Leavitt*, 409 F.3d 1345 (Fed. Cir. 2005) (holding that the MSP allows the United States to initiate an action against any employer that sponsors or contributes to a group health plan).

^{xiv} *Stalley ex rel. U.S. v. Cathlic Health Initiative*, 509 F. 3d 517, 525 (8th Cir. 2007), *Glover v. Liggett Group, Inc.* 459 F. 3d 1304 (11th Cir. 2006) See also, *Manning v. Util. Mut. Ins. Co.* 254 F. 3d 387, 394 (2nd Cir. 2001) (discussing the differences between the MSP and federal False Claims Act that does provide for a qui tam action).

^{xv} It should be noted that the Second Circuit held that the statute of limitations for the MSP Private Cause of Action is six years based on its similarity to the Federal False Claims Act. *Manning v. Utilities Mut. Ins. Co., Inc.* 254 F.3d 387, 394 (C.A.2 (N.Y.),2001) (holding that the six-year statute of limitations applicable to private rights of action under the False Claims Act should be applied to private rights of action under the MSP).

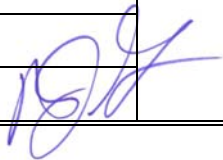
Manning v. Utilities Mut. Ins. Co., Inc. 254 F.3d 387, 394 (C.A.2 (N.Y.),2001)

^{xvi} *Glover v. Liggett*, 459 F.3d 1304 at 1309 (11th Cir. 2006).

^{xvii} *Sedlack v. Braswell Svcs. Group, Inc.*, 134 F. 3d 219, 224 (4th Cir. 1998); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979).

**CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY**

AGENDA BILL

Item #: 4	<u>Title:</u> SUCCESSION PLANNING
Meeting: 11/12/2009	
Agenda Bill #: 1112	
General Manager: 	

Recommended Action:

None.

Item Explanation:

This item was agendized at the request of Directors Hamilton and Williams.

Fiscal Impact:

None

Exhibits:

None

Executive Committee Action: