

APPENDIX

A

Advisory Committee of the Supreme Court of Missouri

Formal Opinion 125

AGREEING TO INDEMNIFY OPPOSING PARTY AS A TERM OF SETTLEMENT

We have been asked whether it is a violation of the Rules of Professional conduct for an attorney to agree to indemnify the opposing party for debts owed by the attorney's client. We have further been asked whether it is a violation for an attorney to request or demand that another attorney agree to such indemnification.

Rule 4-1.8 (e) provides:

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:**
- (1) a lawyer may advance court costs and expenses of litigation, including medical evaluation of a client, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(emphasis added).

Financial assistance can take many forms. It includes gifts, loans, and loan guarantees. Any type of guarantee to cover a client's debts constitutes financial assistance. If a client owes a debt to a third party who expects payment from the client's recovery by settlement or judgment, an attorney may not agree to pay the third party from the attorney's own funds, if the client does not pay the third party.

We note that this opinion is consistent with opinions from Illinois, Arizona, Florida, and North Carolina.¹

Under Rule 4-1.15(f):

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as provided in this Rule 4-1.15 or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and,

¹ IL Adv. Op. 06-01, 2006 WL 4584284 (Ill.St.Bar.Assn.); Arizona Ethics Opinion No. 03-05; FL Eth. Op. 70-8, 1970 WL 10144 (Fla.St.Bar Assn.); 2000 NC Eth. Op 4, 2001 WL 473974 (N.C.St.Bar.)

upon request by the client or third person, shall promptly render a full accounting regarding such property.

If the third parties have a legal interest in the particular funds the attorney is holding and the attorney has notice of that legal interest, the attorney must either disburse the funds to the third party or hold the funds in trust for a reasonable time to allow the dispute between client and the third party to be resolved. If the dispute is not resolved within a reasonable time, the attorney usually² must interplead the funds.

An attorney may include a provision in a settlement agreement in which the attorney agrees to perform obligations that the attorney already has under the Rules of Professional Conduct. An attorney may not assume the further obligation to indemnify the opposing party if the attorney ethically disburses the funds to the client but the client does not use the funds to pay a debt to a third party.

A client may owe a debt to a third party under circumstances that will not require an attorney to hold the amount of the debt in the trust account, if the client does not want the attorney to disburse the funds to the third party. A debt, even one reduced to a judgment, does not establish a legal claim against the particular funds held by the attorney. However, a valid lien against, or garnishment of, those funds would place the attorney under an obligation to hold the funds in trust if the client directs the attorney not to disburse the funds to the third party.

Because an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4, which provides, in part:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another....

Therefore, it is a violation of Rule 4-8.4(a) for an attorney to propose a settlement that includes a provision that would involve a violation of any of the Rules of Professional Conduct by another attorney.

November 13, 2008

² Exceptions would include instances when the amount in dispute is less than the cost of the interpleader action or when other litigation that will resolve the dispute has already been filed.

APPENDIX

B

BURGER LAW FIRM

Trial Lawyers

Licensed in Missouri and Illinois

(314) 542-2222

April 25, 2017

Greater MO Imaging
Attn: Patient Accounts
PO Box 392455
Pittsburg, PA 15251-9455

RE: Alexander Klepper
DOB: X/XX/XXXX
SSN: XXX-XX-XXXX
DOI: XXXXXXXXXXXX

Dear Sir or Madam:

Thank you for advising our office of your lien in the amount of \$1,695.00 for Alex Klepper. There is \$37,489.44 in liens total asserted against him in this case. The case settled for \$90,000, and we have reduced our fee. The amount due to Alex, after attorney fees and expenses, is \$59,224.78. Pursuant to the Missouri Revised Statute 430.225, Alex gets half (\$29,612.39) and his medical providers split half. So, for your balance of \$1,695.00 you are entitled to a pro rata share of 4.52% of this amount or \$1,338.86. All other medical providers' bills have been reduced using the Missouri Lien Statute. Enclosed please find a check in that amount of \$1,338.86 as full and final payment. Please do not hesitate to contact me should you have any questions.

Very truly yours,

Casey Fluegel
Paralegal

Enclosures

500 N. Broadway, Suite 1350, St. Louis, MO 63102
Fax: 314-542-2229

Total Settlement	\$90,000.00
Attorney's Fee	\$ 30,000.00
Medical Records Expense	\$ 418.87
Mileage & Parking	\$ -
Filing Fee / Service	\$ 250.35
Police Report	\$ 6.00
Expert Fee	\$ -
Deposition Fee	\$ -
Office Expense 1%	\$ 100.00
TOTAL FEE AND EXPENSE	\$ 30,775.22

Disposable Amount **\$59,224.78**

1/2 of Disposable Amount **\$29,612.39**

<u>LIEN HOLDER</u>	<u>LIEN AMOUNT</u>	<u>PERCENTAGE</u>	<u>1/2 Disposable</u>	<u>REDUCTION AMOUNT</u>
Dr. Naseem Shekhani	\$ 3,870.00	10.32%	\$29,612.39	\$3,056.86
Greater MO Imaging	\$ 1,695.00	4.52%	\$29,612.39	\$1,338.86
Dr. Paul Amato	\$ 7,354.00	19.62%	\$29,612.39	\$5,808.82
Orthopedica Assocaites	\$ 1,325.00	3.53%	\$29,612.39	\$1,046.60
South County Anesthesia	\$ 3,970.00	10.59%	\$29,612.39	\$3,135.85
Des Peres Square Surger Center	\$ 12,407.00	33.09%	\$29,612.39	\$9,800.12
St. Anthony's Medical Center	\$ 3,636.44	9.70%	\$29,612.39	\$2,872.37
South County Radiology	\$399.00	1.06%	\$29,612.39	\$315.16
Dr. Justin Hill	\$ 2,833.00	7.56%	\$29,612.39	\$2,237.75
	\$ -	0.00%	\$29,612.39	\$0.00
	\$ -	0.00%	\$29,612.39	\$0.00
Total Lien Amount	\$ 37,489.44	1.000		\$29,612.39

November 12, 2013

American Ambulance
Attn: Patient Accounts
1501 South 5th Street
Springfield, MO 62703

Re: Debi Johnson (Houston)

Dear Sir or Madam:

We have received your lien in the amount of \$679.04. We tried this case to a jury in Springfield, Illinois in August of this year. The jury rendered a verdict of only \$36,500.00. To determine your share of this amount as a lien holder we look to a formula in the Illinois lien reduction statute.

The amount of money from the judgment due to Debi, after attorney fees and expenses, is \$14,622.27. Pursuant to the Illinois lien reduction statute, 770 ILCS 23/10, you are entitled to a pro rata share of 20% of this amount as you are a health provider; or a pro rata share of \$2,924.45. The total medical liens for health providers in this case are \$4,236.84. Thus your pro rata share of this amount is \$468.70. Enclosed is a spreadsheet outlining this lien reduction calculation and a check in the amount of \$468.70 for full and final payment for Debi's lien.

Thank you in advance for your cooperation.

Very Truly Yours,

Gary K. Burger

GKB/cjf
Enclosure

ILLINOIS LIEN LAW SETTLEMENT	CLIENT:	OFFER	
MEDPAY		\$36,905.00	
TOTAL DEDUCTIONS		\$36,905.00	
ATTORNEY FEE (30%)		\$11,071.50	
EXPENSES		\$11,211.23	
ADMIN FEE		\$0.00	
MEDICARE		\$0.00	
MEDICAID		\$0.00	
TOTAL DEDUCTIONS		\$22,282.73	
REMAINDER		\$14,622.27	
HEALTH CARE PROFESSIONAL	<i>*See Lien Law Facts</i>	<u>Max per Category</u>	
HEALTH CARE PROVIDER	<i>on Tab 3</i>	<u>\$4,874.09</u>	
TOTAL AVAILABLE	<i>40% after fees/expenses</i>	\$5,848.91	
HEALTH PROFESSIONALS	TOTAL	PERCENTAGE	SHARE
Dr. Jeffrey Birkenmier	\$4,220.00	9.74%	\$284.89
Pain and Rehab Specialists	\$84.00	0.19%	\$5.67
MFG,Spine (Dr. Gornet)	\$31,513.07	72.75%	\$2,127.42
Ortho Center of STL	\$7,502.40	17.32%	\$506.48
		0.00%	\$0.00
	\$0.00	0.00%	\$0.00
	\$0.00	0.00%	\$0.00
TOTALS	\$43,319.47	100.00%	\$2,924.45
HEALTH PROVIDERS			
American Ambulance	\$679.04	16.03%	\$468.70
CT Partners of St. Louis	\$2,990.00	70.57%	\$2,063.83
STL Spine and Ortho Surgey Center	\$567.80	13.40%	\$391.92
		0.00%	\$0.00
		0.00%	\$0.00
		0.00%	\$0.00
	\$0.00	0.00%	\$0.00
TOTALS	\$4,236.84	100.00%	\$2,924.45
LOANS/OTHER PAYMENTS			<i>Loan Payment</i>
The Rawlings Company -AETNA	\$83,078.74		\$8,773.36
			\$0.00
			\$0.00
CLIENT NET PROCEEDS			\$0.00

When Applying IL Lien Law the following rules apply:

1. We must reduce our fees to 30%
2. 40% of the total settlement is available for lienholders
3. That 40% is allotted as follows: 20% for Hospital Liens & 20% for other provider Liens
4. If the 20% available to a set of lienholders is more than total liens, the difference carries over to other set
ie: if \$10K total, so 5K for Hospitals, and \$5K for Providers, and Provider liens only total 2K, the providers get paid in full, and the remaining 3K is added to the allotment for Hospital, making \$8K total available for Hospital
5. No single lienholder category can receive more than 1/3 of the total settlement
6. Medicaid/Medicare/Erisa Plan/MP/Child Support - come out of client portion, lien law does not apply
Typically, Medicaid and Erisa Lienholders will reduce 1/3 if provided with settlement info MP is typically an auto. 1/3 red
7. LIENHOLDER CATEGORY BREAKDOWN
HEALTH CARE PROFESSIONALS: Dentists, Optometrists, Naprapaths, Psychologists, Physical Therapists, Chiropractors
HEALTH CARE PROVIDERS: Hospitals, Ambulance/EMS, MRI Facilities, Home Health Care Agencies, Ambulatory Surgical Treatment Centers, Long Term Care Facilities

APPENDIX

C

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Huey v. Meek, Mo.App. S.D., April 29, 2013

950 S.W.2d 537
Missouri Court of Appeals,
Eastern District,
Division Five.

Kathy SCHWEISS, Plaintiff/Respondent,
v.
SISTERS OF MERCY, ST. LOUIS,
INC., Defendant/ Appellant.

No. 71329.

June 24, 1997.

Motion for Rehearing and/or Transfer
to Supreme Court Denied Aug. 26, 1997.

Application to Transfer Denied Sept. 30, 1997.

Insured participant brought suit against health plan to compel payment of her medical bills for accident. The Circuit Court, St. Louis County, Maura B. McShane, J., entered summary judgment for insured participant, and employer appealed. The Court of Appeals, Crandall, J., held that: (1) reimbursement provision in plan was unenforceable as against Missouri public policy, and (2) insurer could not refuse to pay medical expenses based on insured's refusal to sign reimbursement agreement.

Affirmed.

West Headnotes (4)

[1] **Assignments**

↳ Injuries to Person

Missouri law prohibits assignment of bodily injury claims for reasons of public policy.

7 Cases that cite this headnote

[2] **Insurance**

↳ Medical Insurance

Health care insurer may not be subrogated to its insured's right to recover from third party tort-feasor because it would constitute impermissible partial assignment of insured's action for damages for bodily injury.

Cases that cite this headnote

[3] **Insurance**

↳ Reimbursement from Insured

Reimbursement provision requiring insured to reimburse health plan for medical expenses out of proceeds of any recovery from tort-feasor was unenforceable as against Missouri public policy.

4 Cases that cite this headnote

[4] **Insurance**

↳ Reimbursement from Insured

Health care plan could not refuse to pay insured participant's medical expenses because of her refusal to sign invalid reimbursement provision requiring her to reimburse plan for any medical expenses paid out of damages recovered from third person.

Cases that cite this headnote

Attorneys and Law Firms

*538 Keith A. Rabenberg, Jeffery T. McPherson, St. Louis, for Appellant.

Stephen F. Meyerkord, Prudence W. Kramer, St. Louis, for Respondent.

Opinion

CRANDALL, Judge.

Plaintiff, Kathy Schweiss brought this action against defendant, Sisters of Mercy, St. Louis, Inc. (Sisters of Mercy) to compel payment of her unpaid medical bills to her medical providers. Sisters of Mercy appeals from

the trial court's grant of summary judgment in favor of Schweiss. We affirm.

Kathy Schweiss pays a monthly premium on a contract for health care provided by her employer, Sisters of Mercy. The plan covers Schweiss and her children. It provides, in pertinent part, that if a covered person is injured by a third party and the plan covers the medical expenses, the covered person must agree to reimburse the plan if he or she recovers damages from the third party.

Schweiss and her son were involved in an automobile accident. Their covered medical expenses were approximately \$100,000.00. Schweiss and her family brought an action for damages against the other driver involved in the accident.

Pursuant to the health plan, Sisters of Mercy required Schweiss to sign a "reimbursement" agreement before it would pay the medical expenses she incurred. When Schweiss refused to sign the agreement, the plan refused to pay the expenses.

Schweiss and Sisters of Mercy both filed motions for summary judgment. The trial court granted Schweiss' motion and entered judgment accordingly.

The issue on appeal is whether the trial court erred in finding the reimbursement provision of the health care plan unenforceable.

[1] [2] It is conceded by Sisters of Mercy that Missouri law prohibits the assignment of bodily injury claims for reasons of public policy. *Forsthove v. Hardware Dealers*

Mutual Fire Ins. Co., 416 S.W.2d 208, 217 (Mo.App.1967). It is also clear that a health care insurer may not be subrogated to its insured's right to recover from a third party tort-feasor because it would constitute an impermissible partial assignment of the insured's action for damages for bodily injury. *Travelers Indemnity Co. v. Chumbley*, 394 S.W.2d 418, 425 (Mo.App.1965).

[3] Sisters of Mercy argues that the reimbursement provision at issue in this case is different from *Forsthove* and *Travelers* because it involves the assignment of the *proceeds*, not an assignment of the *claim*. Although this may be a distinction, it is a distinction without a difference.

[4] In *Waye v. Bankers Multiple Line Ins. Co.*, 796 S.W.2d 660 (Mo.App.1990), the appellate court considered a similar reimbursement provision. The court held that the effect of the reimbursement provision *539 was the assignment of an action for bodily injury and invalid as against public policy. *Waye v. Bankers Multiple Line Ins. Co.*, 796 S.W.2d 660 (Mo.App.1990). We find *Waye* persuasive. We hold that the reimbursement provision in question is invalid as against public policy.

The judgment of the trial court is affirmed.

AHRENS, C.J., and ROBERT E. CRIST, Senior Judge, concur.

All Citations

950 S.W.2d 537

APPENDIX

D



 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.