

## Releases: A Primer

By Elisa M. Hatlevig

Understanding and using the correct release can protect insurance companies from the potential for excess exposure as well as minimize the need for ongoing litigation. The names of releases are often thrown around, but do you know the difference between a *Two Harbors* Agreement and a *Meadowbrook* Agreement? What rights do you protect by entering into a *Pierringer* Release? And *Naig*, *Reverse Naig*, *No-Naig*...what?

### Pierringer Release

Outside of a General Release, a *Pierringer* Release is the most recognized and widely used of all releases. Derived from a Wisconsin case, *Pierringer v. Hoyer*, 21 Wis.2d 182, 124 N.W.2d 106 (1963), the Minnesota Supreme Court validated the use of the *Pierringer* release in Minnesota in *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978). North Dakota has also approved the use of *Pierringer* Releases. See *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979).

The purpose of a *Pierringer* Release is to discharge only a portion of a cause of action equal to the percentage of that settling defendant's assigned fault, while preserving the balance of plaintiff's cause of action against non-settling defendants. See *Fredrickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 797 (Minn. 1987). After the *Pierringer* Release is signed, plaintiff's recovery is limited to collecting damages equal to the percentage of fault that can be attributed to the non-settling defendants. *Id.* Even if it is later determined that the settling parties settled for too much or too little, both parties are bound by the release.

The three basic elements of a *Pierringer* Release are:

1. The release of the settling defendant from the action and the discharge of part of the cause of action equal to the fault attributable to the settling defendants probable negligence;
2. Reservation of the remainder of plaintiff's causes of action against non-settling defendants;
3. Plaintiff's agreement to indemnify the settling defendant from any claims of contribution made by the non-settling parties and the satisfaction of any judgment obtained from the non-settling defendants to the extent the settling defendant has been released.

*Frey*, 269 N.W.2d at 920 citing *Simonette*, [Release of Joint Tortfeasors: Use Of the Pierringer Release in](#)

[Minnesota](#), 3 Wm. Mitchell L.Rev. 1, 3, 8, notes 32 and 33 (1977).

### Naig/Reverse Naig/No Naig Releases

In lawsuits between employee/plaintiffs receiving workers' compensation and a third-party tortfeasors, commonly seen releases include the *Naig*, *Reverse Naig* and *No Naig*.

Prior to entering into a *Naig* settlement, an employee/plaintiff must give proper notice to the employer and the employer's workers' compensation carrier of the litigation and ongoing settlement negotiations under Minn. Stat. § 176.061, subd. 8a. See also, *Easterlin v. Univ. of Minn.*, 330 N.W.2d 704, 708 (Minn. 1983). If an employee fails to give proper notice, the employer and insurer may be able to claim a credit from the settlement proceeds for future workers' compensation benefits and preserve their subrogation rights against a third-party tortfeasor.

However, *Naig* Agreements permit employee/plaintiffs to settle all claims except those covered under the Workers' Compensation Act. *Naig v. Bloomington Sanitation*, 258 N.W.2d 891, 894 (Minn. 1977). If used, the *Naig* Agreement must state that the settlement excludes all claims for which the employer and insurer may have a subrogation interest.

A *Reverse Naig* as the name implies, provides a reversal of rights. In a *Reverse Naig*, an employer may settle its workers' compensation subrogation claim with the third-party tortfeasor. In doing so, the employer can avoid certain deductions to its subrogation claim that otherwise benefit the employee/plaintiff.

Employees and employers can also agree that neither side will settle on a *Naig* basis, this is considered a *No Naig* settlement. These types of agreements are much more favorable to employers, because while it limits their right to enter into a *Reverse Naig*, it also limits the employee's flexibility in settling the case.

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### Subscription Information

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*Comments or inquiries may be directed to Shannon Banaszewski.*

## Medicare Set-Asides: What You Need To Expect, Know and Do Part Two: How to Try and Live With These Monsters

by Thomas J. Misurek

One workers' compensation supervisor wrote me after the first article on Medicare Set-Asides appeared in the last issue of JLO legal\*ease. She asked:

“Since we can really only close out future medical claims because our defenses were either a primary denial of liability or that our injury was only a temporary aggravation that required no further medical treatment, why would we use a set-aside?”

Perhaps what the workers' compensation supervisor was pointing out to me were the very narrow occasions that adjusters have to even put forward for approval by a workers' compensation judge a proposed settlement that included a close-out of future medical claims. All of us who circumnavigate the world of Minnesota workers' compensation know that the lives of many workers' compensation claims may be measured in decades, particularly the claims for ongoing medical services on a permanent injury.

However, in some number of cases, the chance for a complete close-out of a workers' compensation claim is memorable when the circumstances do allow for a primary liability defense or for a defense based upon the fact that the injury was only a temporary aggravation with no continuing sequelae or need for ongoing care.

And the answer, of course, to that workers' compensation supervisor's question is that consideration of and use of a Medicare Set-Aside Agreement is only necessary when future medical claims are being closed out in a workers' compensation settlement.

So, with that reminder that consideration of Workers' Compensation Medicare Set-Aside agreements (WCMSA) is only in play when there is a basis in the facts of a claim for a primary liability defense or for a defense that the work injury was only a temporary aggravation, what are other considerations that a Minnesota workers' compensation adjuster has to make in determining whether a WCMSA is possibly in play?

This article will aim to help you make those determinations.

### But first, a seasonal aside

Ah, Spring! It brings the bloom to the lilacs, the crack of the baseball bats, the fishing opener, and, usually in April of most years, a flurry of mailings from one or several arms of the Centers for

Medicare and Medicaid Services (CMS) to workers' compensation adjusters.

Such April mailings may come from CMS or from any of a spring-snow flurry of initial-holders for CMS. From a Coordination of Benefits (COB) contractor, in the past from a regionally-contracted Medicare Secondary Payer Recovery Contractor (MSPRC) such as was Noridian, or, as now may be expected from the single national Medicare Secondary Payer Recovery Contractor, Chickasaw Nation Industries (which, since it is now the only player in the MSPRC game, does not even use its name on the letterhead; rather, the letterhead now just reads MSPRC, and includes the CMS logo). Since this new national MSPRC just assumed responsibility on October 2, 2006 for the recovery efforts of CMS and since this new national MSPRC has claimed that taking over the national workload has engendered some delays, it is unclear if these normal April mailings will actually occur before Johann Santana is taking the mound this Spring for his third start of the 2007 Twins baseball season, or for his opening pitch this Fall in the 2007 World Series.

### What to do with initial communications from Medicare

What is an adjuster to do when the adjuster receives a letter from one of these Medicare initial-holders, most likely MSPRC or CMS? Well, if that letter has the name of a recognized workers' compensation claimant in the letter, first, do not ignore it, do not circular-file it. This is the first and maybe the only easiest opportunity that you have—in your duties to your insured employer and to your employing insurer or third-party claims administrator—to stop or to slow Medicare from putting a claim into an administrative judgment and recovery and collection process against your insured or your own office by the federal government.

This often-mailed-in-April letter will likely not only mention your workers' compensation claimant by name, but will likely also indicate that Medicare has made conditional medical treatment payments for which treatment expense Medicare is claiming that your insured, your insurance company, or you as the third-party administrator of the workers' compensation plan covering the claimant has a primary responsibility to pay.

If the employer/insurer has a basis for a denial of responsibility for the conditional medical treatment payments that Medicare says it has made, then you need to respond to the agency that sent you this letter with at least a simple statement that you deny or dispute the claim that the employer and its workers' compensation insurer have a primary responsibility for the treatment expenses for which Medicare claims it has made conditional payments.

You should also send to the workers' compensation claimant for execution and return

to you a copy of a Centers for Medicare and Medicaid Services Consent to Release form allowing you or your counsel to obtain information from Medicare and to converse with Medicare about the conditional payments that Medicare is claiming it has made. A sample Medicare Consent to Release form is included at this web address:

<http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/wcchecklist.pdf>

If you have counsel representing you in the defense of the workers' compensation claim, you should forward the letter that you received from Medicare, CMS, or MSPRC to your counsel for your counsel to put Medicare on notice of its right to intervene in the Minnesota workers' compensation litigation and also forward a copy of the claimant-executed Medicare Consent to Release form to your counsel.

If Medicare, CMS, MSPRC does intervene in the Minnesota workers' compensation litigation for the past medical treatment bills it has paid, your counsel can at least argue that Medicare has waived its right to proceed in any other legal forum to collect on those bills and therefore, Medicare has no greater or lesser rights than any other intervenor in a Minnesota workers' compensation matter.

Of course, the U.S. Department of Health and Human Services attorney who ultimately may be involved in any settlement negotiations regarding Medicare's intervention in the Minnesota workers' compensation litigation may try to laugh at this argument claiming federal pre-emption and a right that Medicare has as a type of super-sized Intervenor with super-sized federal-law rights to collect however and wherever it can, nonetheless, the Minnesota workers' compensation judge can put some pressure on Medicare to participate in the Minnesota workers' settlement negotiations as must any Minnesota workers' compensation intervenor or have its Minnesota claim for intervention dismissed. And, until, the U.S. Eighth Circuit Court of Appeals or the U.S. Supreme Court specifically rules on a case that says what such a dismissal does to Medicare's claimed super-intervention rights and on the issue of whether Medicare waived its rights to such super-sized collection rights under federal law, your counsel at least has some chance to try to make Medicare deal with a settlement of past medical treatment expenses as he or she would with any other Minnesota workers' compensation intervenor for past medical bills.

### When are WCMSAs necessary?

If you are contemplating or if you expect to seek a full, final and complete settlement of a claimant's workers' compensation claims—including future medical claims—here are the questions that you need to address in determining

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Jardine, Logan & O'Brien, P.L.L.P.'s Selected References to Motor Vehicle Liability Law 2007 is now available in both Minnesota and Wisconsin versions.

If you would like a copy (or additional copies) of this informative and useful resource on Motor Vehicle law, please submit a request to: Larry Rocheford at 651-290-6516 or [lrocheford@jlolaw.com](mailto:lrocheford@jlolaw.com).

Upcoming Seminar

Marlene Garvis will be the moderator and Thomas Cummings will be part of the faculty for a seminar presented by Lorman Education Services on June 22, 2007 in Bloomington. The seminar is entitled "The Basics of Employment Claims, Workers' Compensation Claims and the Interplay Between the Two in Minnesota." If you are interested in attending, please contact Lorman Education Services at (866)352-9539.

assumes an insured's total defense on a multi-claim lawsuit under a reservation of rights, whereby only a portion of the lawsuit provides insurance coverage for an insured. *Meadowbrook, Inc., et al v. Tower Insurance Co., Inc.*, 559 N.W.2d 411 (Minn. 1997).

An insurer's duty to defend an insured is considered contractual. In *Land Construction Corp. v. Continental Casualty Co.*, 258 N.W.2d 881, 883 (Minn. 1977), the duty to defend generally covers those claims that arguably falls within the scope of the policy. *Id.*

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if a Workers' Compensation Medicare Set-Aside Agreement is necessary:

- "Is the claimant a current Medicare beneficiary?"
- If the answer to that question is "yes," then the next question you need to answer is:

- "Is the 'total settlement' in excess of \$25,000?" (Recognize "total settlement" is defined as including all past payments on any previously settled portion of the workers' compensation claim as well as the total of all sums paid to settle claims for wages, attorney fees, future medical and prescription medicine payments and repayment of Medicare conditional payments; on structured settlements/annuities, Medicare includes in its definition of "total settlement" the amount that the annuity is expected to pay, not the present-day value or the cost of funding the annuity.)

- If the answer to that question is "yes," then a WCMSA is mandatory.

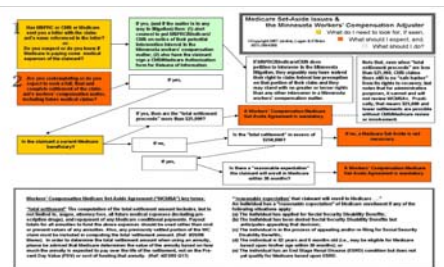
- **If the claimant is not a current Medicare beneficiary**, the question you need to address is: "Is the total settlement in excess of \$250,000?"

- If the answer to that question is "no," a WCMSA is not necessary.

- However in the case that the claimant is **not** a current Medicare beneficiary, **but** the total settlement is **in excess of \$250,000**, then you must ask this question: "Is there a 'reasonable expectation' that the claimant will enroll in Medicare within 30 months?"

- If the answer to that question is "yes," a WCMSA is mandatory. (Recognize that "reasonable expectation for enrollment in Medicare within 30 months" is defined as any of these conditions: the claimant has applied for Social Security disability benefits; or, the claimant has been denied Social Security disability benefits but anticipates appealing that decision; or, the claimant is in the process of appealing or re-filing for Social Security disability benefits; or, the claimant is 62 years and 6 months old (i.e., may be eligible for Medicare based upon age within 30 months); or, the claimant has end-stage renal

disease, but does not yet qualify for Medicare based upon that disease.



Want a handy guide for the workers' compensation adjusters to use in deciding if a WCMSA agreement is necessary? Call (651-290-6577) or email [tmisurek@jlolaw.com](mailto:tmisurek@jlolaw.com) and request a copy of the JLO Medicare Set-Aside guide, a decision-tree flowchart that will help you determine if a WCMSA is necessary in a workers' compensation case in which you want a full, final and complete—including future medical claims—settlement. •

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Two Harbors Agreements

Two Harbors Agreements are typically seen in construction cases involving numerous subcontractors. Based upon *Rice Lake Contracting Corp. and City of Two Harbors v. Russ Environment and Infrastructure, Inc.*, 616 N.W.2d 288 (Minn. 2000), a Two Harbors Agreement is entered into by a plaintiff and a defendant whereby a defendant agrees to pay plaintiff a designated amount of money, a portion of which is paid out in a promissory note.

The promissory note signifies that the remainder of the money will be obtained from other third-party defendants that were not party to the settlement agreement. The defendant assigns its right to plaintiff to step into its place and pursue indemnity against the third-party defendants that the defendant in its own right would have the right to recover from. The purpose of the Two Harbors Agreements is to permit a defendant to settle the claims against it and be released from the lawsuit and plaintiff to receive a portion of its money from defendant but still maintain additional action against the third-party defendants.

Meadowbrook Agreements

Meadowbrook Agreements are used when an insurer

However, when an insured is sued for negligence (a claim typically covered under an insurance policy) and an intentional tort (a claim typically not covered under an insurance policy), a *Meadowbrook* Agreement permits an insurer to settle the insured's causes of action and withdraw its defense, leaving the insured to defend itself on the intentional tort.

Miller-Shugart Agreements

Miller-Shugart agreements are entered into between plaintiffs and tortfeasor/insureds when an insurance carrier disputes its responsibility to defend and indemnify, thus creating a barrier to settlement.

In *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1992), the court found that an insurer could not force an insured to forego a settlement which was in their best interest, typically to avoid personal exposure to a lawsuit.

There are four components to a valid *Miller-Shugart* Agreement, including:

1. The named insured must be a party to the agreement;
2. The insurer must deny coverage;
3. The insurer must be given notice of the agreement; and
4. The agreement must be reasonable.

*Id.* The trial court determines the reasonableness of a *Miller-Shugart* Agreement. *Burbach v. Armstrong Rigging and Erecting, Inc.*, 560 N.W.2d 107, 110 (Minn. App. 1997).

Understanding these releases and their use is invaluable to any party to a lawsuit. When the correct release is properly used, parties to a lawsuit can assure that their interests are protected.

These are just some of the releases that are used during the litigation process, if you have questions regarding other types of releases you have heard about or used, please contact the author. Samples of the releases discussed in this article, as well as releases not discussed in this article are available. •

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*If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.*

Coming in the Summer 2007 Issue...

*Employment Law*

*Legislative Update*

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