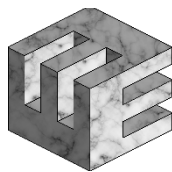


White Paper

SUBROGATION UNDER THE MSP ACT -- UNDERCOLLECTION & CORRECTION - AN INNOVATIVE APPROACH

Prepared by



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SUMMARY/INTRODUCTION

The US Federal Government should be – and *could* be -- collecting significant amounts of money for injury claims that have been paid for by the Center for Medicare Services (CMS) through Medicare and later recovered by Medicare Beneficiaries in legal settlements. These medical cost recoveries are mentioned specifically in documents filed in state and local courts.

Current CMS efforts to recover these funds are resulting in severe undercollection because of a systemic oversight – the US’s fragmented state and local court system and lack of centralized record keeping and tracking. These under collections are *significant* -- they could total more than **\$10B annually**. An innovative proprietary software system, ELG Correct-Collect™ (patent pending) can fill in the gap by enabling CMS to meet the challenge in collecting the funds that are due and uncollected.

(ELG Correct-Collect™ is the product developed by Environmental Litigation Group, PC (ELG LAW), a Birmingham, AL based firm with extensive experience in Federal bankruptcies, probate, contract development and dispute resolution, corporate law, and debt collection with a focus on the Medicare Secondary Payer Act. ELG LAW has successfully administered 25,000 cases from inception through completion in the areas of bankruptcy and probate, as well as Medicare subrogation. (Attachment I)).

BACKGROUND/ANALYSIS

The US Federal government has the right of subrogation – *which is the substitution of one person or group by another with respect to a debt or insurance claim* -- for payments made under the Medicare Act. This means the courts can place a lien -- *a form of security granted over property including funds to secure the payment of a debt or some other obligation* -- on settlement monies, which -- in this case -- are paid to a Medicare Beneficiary who successfully pursues legal action

regarding an injury or condition. He or she must reimburse Medicare, if Medicare has already picked up the bill for the injury or condition related to the legal action.

This lien under the Medicare Act is known as a “**super lien**” due to the fact that its scope is unlimited -- the Medicare Secondary Payer Act (MSP Act) gives the government rights far in excess of traditional subrogation rights. *The Center for Medicare Services (CMS) must be reimbursed for payments made on behalf of a Medicare Beneficiary for any injury/condition, if he or she is later reimbursed by other entities, e.g., an insurance company, for the same injury/condition.*

CMS is aware of the need to recover monies subsequent to the MSP Act, and has been doing so. This collection has been performed by Medicare Secondary Payer Recovery Contractors (“MSPRC”) which are paid on a contingency fee basis, as shown in **Table 1**.

Amounts Returned to the Medicare Trust Funds (\$mm) FY 2014					
Overpayments Collected	Underpayments Restored	Overtured on Appeal	Contingency Fees	CMS Administration Costs	Returned to Medicare Trust Funds
\$2,394.8	(\$173.1)	(\$157.4)	(\$274.6)	(\$186.3)	\$1,603.4
Source: Recovery Auditing in Medicare for Fiscal Year 2014 -- FY 2014 Report to Congress as Required by Section 1893(h) of the Social Security Act.					

Table 1 – *MSPRCs receive contingency fees for finding and collecting overpayments.*

SPRC recoveries, now under the Benefits Coordination and Recovery Center (BCRC), are not clearly stated in the 2014-2015 CMS Financial Reports. But their figures indicate that MSPRC recoveries of **ALL** MSP debt (of which lawsuit recoveries represent **only a portion**) was \$526-585 million in years 2011-2013. **And the US Federal Government could and should be collecting far more.**

Due to the fragmented nature of the court system -- and the fact that there is no unified, single database tracking this matter -- more **than \$10 Billion a year** may be recoverable from lawsuit monies as shown below in **Table 2**.

Summary Table – 2011-2013 Monies Eligible for Recovery under MSPRC	
Possible Recovery	Rationale - Source
\$1.2 B	Number of Payments 2011 – 2013 (8,673) x Avg. Payment \$232k) (Source: HHS Data Bank) – (Estimated Medical Claims Paid to Beneficiaries (\$400k) ¹
\$3.8 B	Asbestos Injury ²
\$2.235 B	Pharmaceutical Injuries ³
\$2.28 B	Motor Vehicle Injuries ⁴
\$25.677 B	Slip and Fall Injuries ⁵
\$35.2 B	TOTAL ELIGIBLE FOR RECOVERY (3 Year Total)
\$1.7 B	TOTAL MSPRC RECOVERY 2011-2013 (an unknown portion was lawsuit recoveries)
\$33.5	Deficit – Amount that “falls through the cracks” over the-year period

Table 2 – The US Federal Government should be collecting the full \$10B/year owed to it under Medicare

For the years 2011-2013, CMS recoveries (\$1.659 billion) have been miniscule compared to lawsuit monies available (\$35.2 billion). The problem is worse than it appears, as lawsuit collections make up an unknown portion of the Total MSPRC Recovery. According to CMS Financial Reports in 2013 the total amount of MSPRC recoveries was \$585 Million, which includes recoveries for mistaken payments, delinquent debts, **in addition to** lawsuit recoveries, etc. However, even if it was assumed that the entire \$585 Million was for lawsuit recoveries, the total amount of lawsuit monies available for subrogation was approximately \$12 Billion, meaning less than 5% of available monies were collected.

Currently, over \$12 Billion per year in lawsuit injury monies (“lawsuit monies”) are paid to Medicare Beneficiaries (the 37+ million people who are covered by Medicare and use it). CMS subrogation recovery (“recovery”) pursuant to the MSP Act is severely underperforming due to systemic issues, resulting in an inability to collect the substantial lawsuit monies available using current methods.

¹ U.S. Dept. of Health and Human Services Data Bank

² Fitch Ratings, Insurance Information Institute, NERA Economic Consulting, Institute For Legal Reform, The American Cancer Society, LexisNexis, National Cancer Institute, Centers for Disease Control and Prevention

³ U.S. Justice Department, Public Citizen’s Health Research Group, New York Times, KPMG International

⁴ Centers for Disease Control and Prevention, National Highway Traffic Safety Administration, RAND Institute for Civil Justice, Verisk Analytics, Insurance Research Council, Insurance Information Institute

⁵ Centers for Disease Control and Prevention, National Floor Safety Institute, National Safety Council

These figures are validated by our detailed and authoritative study of lawsuit recoveries from medical malpractice, pharmaceutical, motor vehicle, slip and fall, and other tort injury cases, and our study has shown a consistent increase in cases filed in local, state, and federal courts, as well as an increase in total settlement monies paid out resulting from the resolution of those cases filed. Filing of these types of cases continues to increase along with the total settlement monies paid out.

Many of these cases are for injuries prevalent in an older Medicare-aged population. In the 5 years from 2010 to 2014 the total settlement amount in lawsuit monies subject to the MSP Act increased by almost \$1 Billion, from \$11.2 Billion to over \$12 Billion.

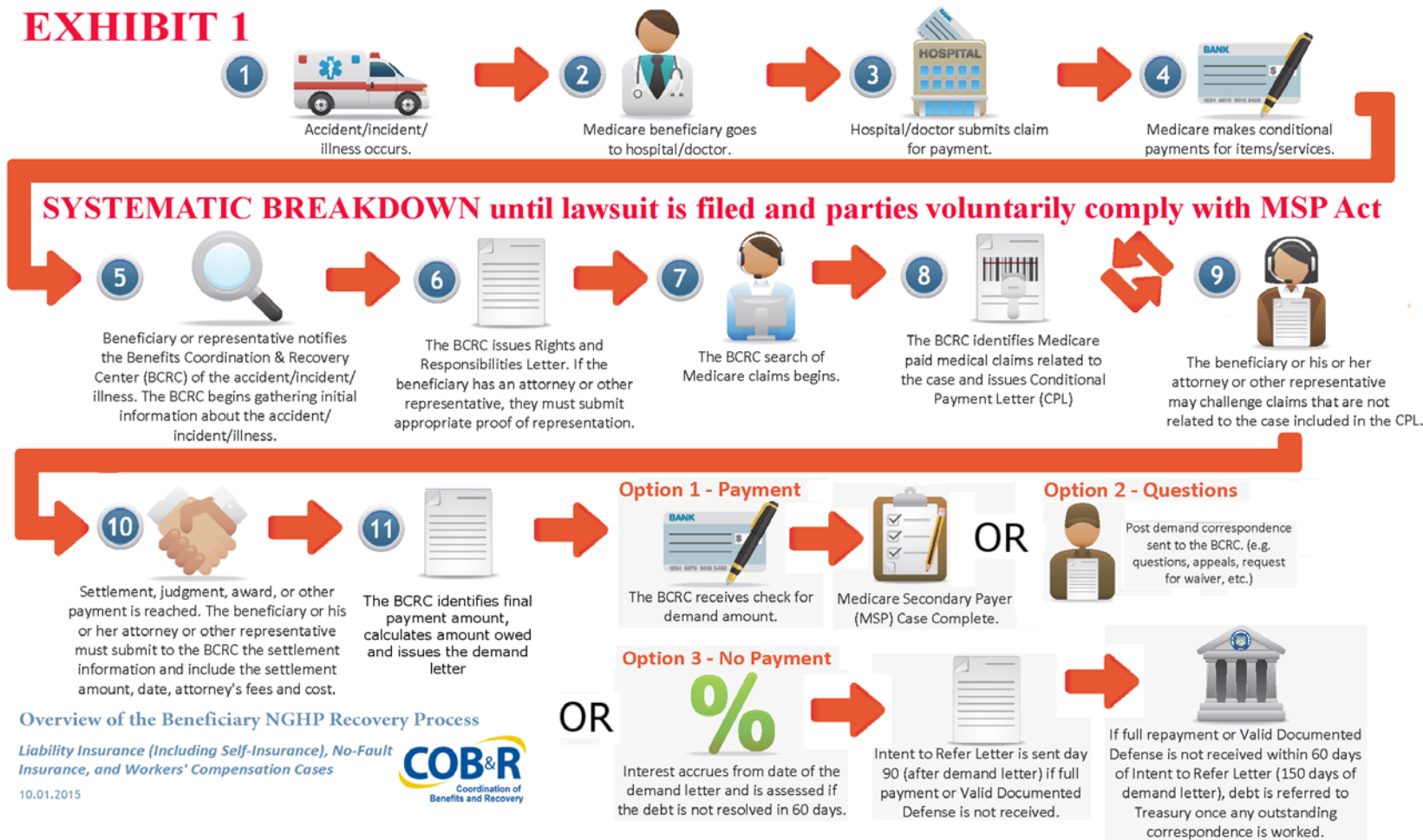
The number of Medicare Beneficiaries will also continue to trend upwards as current lifespans increase and millions more reach the Medicare age threshold. These combined factors will result in continued increases in both lawsuit monies available and potential CMS recovery from those monies.

CURRENT COLLECTIONS FALL FAR SHORT

The systemic problem of undercollection exists because the current process is reactive, lacks proper noticing to all necessary parties, and is based on *voluntary* compliance with the MSP Act. The Flow Chart in Exhibit 1, below, shows the current process of MSP Act Collections. The process breaks down after step 4 and before step 5, as the current system essentially allows for voluntary participation without sufficient enforcement or tracking. There is no centralized repository for information concerning these types of settlements in state and local courts nationwide that would enable CMS to collect the monies it should be collecting.

Medicare Conditional Payment Subrogation

EXHIBIT 1



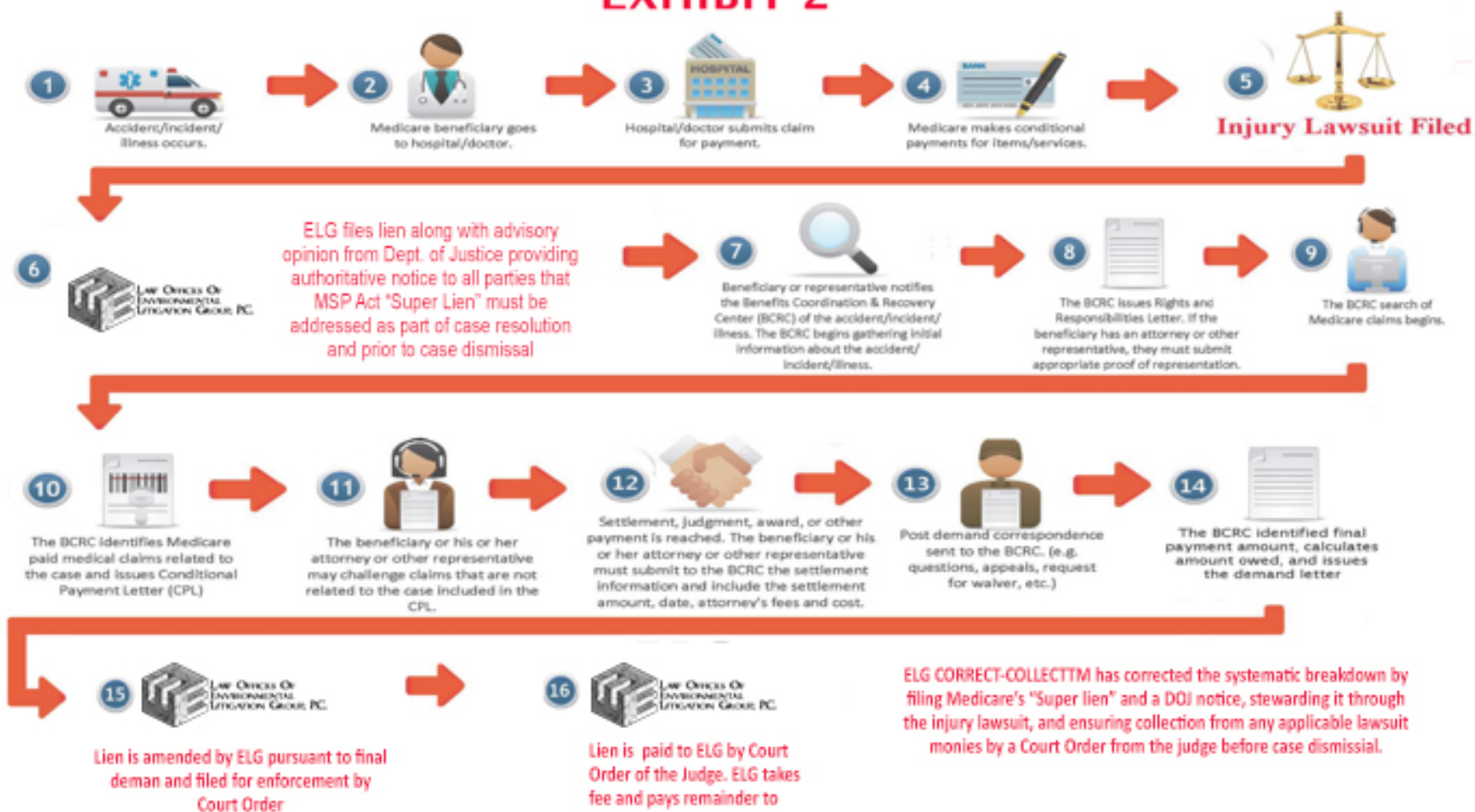
Medicare Conditional Payment Subrogation

SOLUTION - ELG CORRECT-COLLECT™

Environmental Litigation Group has developed a proprietary software — ELG Correct-Collect™ (patent pending) which proactively identifies all cases subject to the MSP Act, notifies all parties of a potential Medicare lien, and ensures all injury cases must comply with subrogation as part of case resolution. ELG Correct-Collect™ is an innovative technology which increases efficiency in identifying and collecting maximum subrogation recoveries. Exhibit 2, below, details how ELG Correct-Collect™ works. How it remedies the faults in the current process is written in red. As detailed, there exists a systematic breakdown between the original steps 4 and 5. This breakdown is corrected as follows: step (5) an injury lawsuit is filed and subsequently identified by ELG, step (6) ELG files a lien on behalf of Medicare which includes simple reporting instructions, thereby enforcing step (7) mandatory reporting to BCRC. Later, after the injury lawsuit is settled and any Medicare lien amount negotiations are complete, step (15) ELG amends the original lien for Medicare's final demand amount, step (16) the Court orders payment of the lien through ELG, which recoups its fee and passes the remainder to BCRC for Medicare, which now allows the lawsuit to be dismissed.

Medicare Conditional Payment Subrogation

EXHIBIT 2



Medicare Conditional Payment Subrogation

CONCLUSION

ELG Correct-Collect™ can complement current efforts underway to remedy CMS's severe undercollection problem. A pilot program can be readily established, at no expense to CMS – on a contingency basis pursuant to Section 1893(h) of the Social Security Act to demonstrate the effectiveness of this software-driven collection system.