Personal Injury Settlements:

Subrogation, Rights of Recovery, Liens, Taxation and Other Financial Issues

By L. Mark Bonner

On behalf of injured clients, attorneys seek recovery from a variety of sources. In addition to civil suits against tortfeasors, claims may be made under the claimant's own automobile and health insurance policies, under the workers' compensation program, or under government disability and welfare programs. These non-tort claims may result in the creation of subrogation interests, rights of recovery, and liens against future settlement funds.

A balanced knowledge of subrogation interests, rights of recovery, and liens is necessary to attorneys from both legal and ethical standpoints. Attorneys may have competing obligations to their clients and to third parties. Oklahoma Rule of Professional Conduct 1.3 requires an attorney to act with reasonable diligence on behalf of the client.[1] Yet, the representation must be within legal and ethical boundaries. In *Oklahoma Bar Association v. Bedford*,[2] an attorney was suspended for two years and one day based, in part, upon his failure to honor a hospital lien.

Resolution of subrogation and lien claims, rather than resolution of the merits of the plaintiff's case against the defendant, often determines whether the litigation will be financially successful. The only relief provided by the civil justice system in personal injury cases is an action to recover money for damages. Therefore, the success of a personal injury lawsuit can only be defined by whether a recovery is ultimately made on behalf of the plaintiff.

There are other important financial issues which must be considered during the settlement process. Personal injury attorneys do not ordinarily provide advice in the area of financial planning and tax law. However, personal injury plaintiffs should be made aware of several financial and taxation issues to be discussed with tax attorneys, accountants, or financial advisers who do provide such advice.

I. TAXATION AND INVESTMENT OF SETTLEMENT PROCEEDS

A. Income Taxation

Amounts recovered for physical injuries are generally not taxable. Income from investment of the settlement proceeds is generally taxable.[3] The personal injury plaintiff should contact a tax adviser to discuss whether particular elements of a settlement will be subject to income taxation. Judicial decisions in this area are both numerous and fact specific. One of the issues is whether the damages are for "personal injuries" or for "physical injuries." These rules change from time to time and from Court to Court as the rules are tested by both taxpayers and the IRS.[4]

B. Settlement Annuities

The decision whether or not to "annuitize" the settlement should be carefully considered because it will affect the personal injury plaintiff's finances for the rest of his or her life. The settlement annuity must be elected before constructive receipt of the settlement funds. There is no opportunity to structure the settlement after constructive receipt of the settlement funds. If the settlement is structured, then the annuity payments, both principal and interest, are not subject to federal income taxes.[5] Section 130 settlement annuities are only available for settlement of physical injuries and physical

sickness. Again, a tax adviser should be consulted if there is any question about taxability.

The rate of return is locked in for the duration of a fixed rate settlement annuity. The rate of return for a fixed rate settlement annuity is generally more favorable than the rate of return available through a bank certificate of deposit. Rates of return for fixed rate settlement annuities vary from company to company. Bids are collected by a broker, who is paid a percentage of the cost of the annuity when a settlement annuity is purchased. One fixed rate annuity company offered non-taxable rates of about 5% during July 2003. This equates to about a 7% tax equivalent yield for a person in the 28% federal income tax bracket. Variable annuities are also available which rise and fall along with market growth and market losses.[6]

If the personal injury plaintiff needs access to the annuity funds sooner than the settlement annuity payment schedule provides, a settlement annuity may not be a good option. The market for the resale of annuities is not as "liquid" as that for publicly traded securities. A Court Order is required before a structured settlement annuity may be transferred.[7] The federal government imposes a 40% tax on unapproved sales of settlement annuities.[8] There is a remote possibility that the annuity company will become insolvent. Guarantees are available which insure the annuity payments. It may be difficult or impossible to liquidate the annuity and invest the funds elsewhere if the annuity company encounters financial difficulty.

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The settlement annuity is particularly well suited to the settlement of the claims of children. In Oklahoma, a child's settlement must be invested in an account at a federally insured banking institution, a trust department of a banking institution, or in a structured settlement until the child reaches 18 years of age.[9] Bank accounts may pay low interest rates. Parents and Guardians are often reluctant to pay the fees of bank trust departments. Under these circumstances, the settlement annuity is a viable alternative for the long term investment of minors' funds.

C. Double Tax-exempt Bonds

Double tax-exempt bonds provide income which is not taxed at the state or federal level. Unlike annuities, they may be purchased after receipt of the settlement funds. They have a more liquid resale market. Rates of return vary from bond to bond. Municipal bond rates in the national market ranged up to 5.35% during July 2003. Rates of returns on double tax-exempt bonds issued in Oklahoma might be less. There are other types of double tax-exempt bonds in addition to municipal bonds. The risk of financial failure of the issuing authority corresponds to the creditworthiness of the city or agency issuing the bonds. To discuss double tax-exempt bonds, other types of bonds, or standard annuities, a broker should be contacted.

D. Stock Market

Investing in the stock market is riskier than investing in annuities or bonds because there is no set rate of return. Stocks listed on the major exchanges are easy to buy and sell quickly. Market fluctuations may be quite volatile and may cause large gains or large losses. At other times, the market may be flat and produce little or no return on investment. Many stock analysts forecast an unimpressive rate of return over the next few years. Nevertheless, over long periods of time, the stock market tends to outperform other investments. Between 1946 and 1979, the Standard & Poor's 500 total return averaged 11.5 percent, according to Graham & Dodd's Security Analysis. This equates to a 7.7% tax free rate of return for a person in the 28% federal tax bracket and in the 7% state tax bracket.

E. Medicaid Trusts

Severely injured clients may have future medical needs which require special consideration and planning. Some medical needs occur regularly, such as the need for regular medical examinations and treatment, in-home attendant care, and medications. Other needs may

be less regular, such as replacement of prosthetic devices, replacement of specially equipped vehicles, and modification of living quarters.

For severely injured persons who will have substantial future medical needs, a "Medicaid Trust" may be utilized to fund needs which are not met by Medicaid. This area of the law changes as various states change their laws and as various forms of Medicaid Trusts are challenged in court. Medicaid Trusts must be properly established or the trust will be required to pay for benefits that otherwise would be paid by Medicaid.[10]

II. SUBROGATION, RIGHTS OF RECOVERY, AND LIENS

A. Collateral Source Rule

Payments made by the claimant's insurance carrier do not reduce the amount recoverable from the defendant in a civil lawsuit, except in medical liability cases.[11] The collateral source rule provides that when a plaintiff is compensated for his injuries by some source independent of the tortfeasor — insurance or government agency benefits, for example — the plaintiff is still entitled to make a full recovery against the tortfeasor.[12] The theory of the collateral source rule is that the tortfeasor should not benefit from sources that were not supplied at the tortfeasor's expense.[13]

The collateral source rule applies to a wide variety of benefits, such as gifts of money or services; private medical, hospital, dental, or life insurance; and unemployment, veterans, social security, Medicare, Medicaid, workers' compensation, and other government benefits.[14] The collateral source rule does not mean, however, that the claimant receives a double recovery. Subrogation, liens, and rights of recovery all may act to reduce the claimant's ultimate recovery.

B. Subrogation

Subrogation permits a person who has paid a debt on behalf of another to make a claim for repayment. For instance, an insurance carrier might make a subrogation claim against settlement proceeds from a lawsuit related to a loss for which the carrier paid.

Subrogation comes in two forms. The first form is conventional or contractual subrogation. Conventional subrogation results from an agreement or contract which provides subrogation rights in exchange for payment of losses.[15] Many insurance policies and plans give the insurer a right to recover payments if there is a settlement. This provision is the source of conventional or contractual subrogation. The agreement between the parties must be reviewed in order to determine the extent of contractual subrogation. If the insurance contract is an indemnity contract, rather than an investment contract, subrogation rights may exist.[16] Insurance carriers often try to elevate their subrogation interest to the level of a lien, but by definition, a mere subrogation interest is not a lien. A subrogation interest arising from the insurance contract is simply that; a contractual obligation which does not imply a right to be paid out of specified funds.[17]

The second form is equitable or legal subrogation. Equitable subrogation does not depend on a contract. Equitable subrogation attempts to balance the equities of a non-volunteer payor and the party primarily liable for a debt.[18] In other words, the insurance carrier may stand in the shoes of the insured to obtain a recovery from the tortfeasor responsible for the loss.[19]

In some situations, subrogation is prevented by statute. For instance, an insurance carrier is not entitled to subrogation of medical payments coverage.[20] If subrogation is permitted, then a party entitled to subrogation may sue the tortfeasor directly, whether or not the victim brings suit against the tortfeasor.[21] *In Porter v. MFA Mut. Ins. Co.*,[22] the court explained that the previous rule against direct suits by insurance carriers against tortfeasors is no longer valid.

C. The "Make Whole" Doctrine

The make whole doctrine stands for the proposition that if a tort victim is not made whole by recovery of all elements of damages from the tortfeasor or liability insurance proceeds, then subrogated parties are not entitled to reimbursement. In *Equity Fire and Cas. Co. v. Youngblood*,[23] the Supreme Court adopted the make whole rule in contract subrogation and reimbursement cases where there is no priority set by the contract and the compensation represents less than full compensation.

Conventional subrogation derived from an insurance contract merely acknowledges, but does not expand, the equitable right of subrogation.[24] Under equitable principles the

insured may not be permitted a double recovery as to his carrier. However, if the insured has not been made whole, then avoidance of double recovery does not require subrogation. The insurer's right of subrogation may not be exercised until the insured has been made whole.[25]

D. The Common Fund Doctrine

The common fund doctrine permits the plaintiff to recover attorneys' fees and costs necessary to make a recovery which ultimately is paid to the party holding the subrogation interest.[26] Under the common fund doctrine, the ratio of the payments to the total damages is applied to the net recovery, to derive the amount due to the insurance carrier.[27]

E. Workers' Compensation

Prettyman v. Halliburton Company,[28] held that a workers' compensation carrier has a statutory subrogation interest under Okla. Stat. tit. 85, § 44 when the claimant settles a third party tort claim. The amount of the subrogation recovery is in accordance with a formula set out in the Prettyman opinion.

In *ACCOSIF v. American States Ins. Co.*,[29] the court expanded on *Prettyman*. In *ACCOSIF*, the court noted that a right of recoupment exists in addition to the statutory subrogation provided in § 44. The subrogation interest exists when the carrier sues the tortfeasor or joins the claimant's suit against the tortfeasor and is subject to a two year statute of limitations. The recoupment or wrongful payout claim exists in a separate claim against the claimant or the tortfeasor's insurer and is subject to a three year statute of limitations.

F. Social Security Disability and Survivor Benefits and Supplemental Security Income

Applicants become eligible for social security benefits upon retirement, disability, or the death of certain family members. Applicants in financial need, 65 years of age or older, or blind, or mentally or physically disabled, may be eligible for monthly supplemental security income checks from the Federal Government called "SSI" checks.

Supplemental Security Income and welfare benefits are needs based programs. If the applicant's income and assets are low enough to meet the requirements, then the benefits are awarded. These programs are not ordinarily a factor in personal injury cases except to the extent that a personal injury award could cause the applicant's assets to exceed the benefits threshold and therefore disqualify the applicant. A properly structured special needs trust may avoid such a disqualification.

G. Medicaid

Medicaid programs pay for medical care and are governed by state law. Medicaid is needs based, meaning that the applicant's income and assets are measured in order to determine if Medicaid benefits will be granted. Examples of Medicaid recipients include: Recipients of Aid to Families with Dependent Children (AFDC); Supplemental Security Income (SSI) recipients; Infants born to Medicaid-eligible pregnant women; Children under age 6 and pregnant women with financial needs; Recipients of adoption assistance and foster care; and, "Categorically needy" groups in some states, typically, infants and pregnant women, certain aged, blind, or disabled adults, children under age 21, and institutionalized individuals who meet income and resources requirements.

Medicaid recovers its payments pursuant to 42 U.S.C. § 1396p and Okla. Stat. tit. 63, § 5051.1(D). A Medicaid recipient who asserts a claim against a third party is required to notify the Oklahoma Health Care Authority of the claim and any settlement thereof.[30] Oklahoma's Medicaid recovery statute creates a lien and authorizes, "other legal action necessary to recover the amount so paid . . . ."[31] The lien is effective upon mailing notice and filing notice with the Court Clerk of Oklahoma County.[32] This lien is preempted by federal law to the extent it impairs the Medicaid recipient's property interest in the settlement during the lifetime of the recipient.[33] In *Wesley Health Care Ctr., Inc. v. DeBuono*,[34] the Court held that the Medicaid statutes do not provide a right for insurance carriers to collect payment from third parties.

A "Medicaid Trust" may be utilized to fund benefits to the injured person which are not paid by Medicaid. This area of the law is in a state of flux. The trust must be properly drafted or the trust corpus will prohibit the receipt of Medicaid benefits.[35]

H. Medicare

Medicare pays medical bills for people who are over 65 years old or who are disabled.

Medicare is not dependent on a finding of need. It is available regardless of the applicant's income and assets. It is funded from the Social Security Trust Fund.

Hospital Insurance ("Part A") is financed by payroll (FICA) tax that also pays for Social Security. Medical Insurance ("Part B") is financed by monthly premiums paid by people who choose to enroll. Recipients become eligible at 65 if they receive Social Security or railroad retirement benefits, if they have worked long enough to be eligible, or would be entitled to Social Security benefits based on a spouse's work record. Prior to age 65, recipients are eligible for Medicare hospital insurance if they have been a Social Security disability beneficiary for 24 months, or have worked long enough in a Federal, State, or local government job and meet the requirements of the Social Security disability program.

Submission of medical bills to Medicare is mandatory.[36] Some medical providers attempt to avoid acceptance of below market rate Medicare payments by refusing to submit their bills to Medicare and then attempting to recover the full amount of the medical bill from settlement funds. This is called balance billing. This is prohibited if the patient is entitled to payment by Medicare.[37]

It is doubtful that Medicare is entitled to reimbursement for payments relating to personal injury cases.[38] The key regulatory language pertains to whether payment by an insurance carrier may be expected "promptly." Medicare will not pay benefits if payment has already been made or will be made promptly.[39] Medicare regulations define prompt payment as payment within 120 days of the claim.[40] If payment by the liability carrier is not made promptly, then Medicare provides conditional benefits.[41]

Medicare is sometimes said to have a "superlien." However, Medicare's interest is really a "right of recovery" under Medicare's terminology.[42] Receipt of the Medicare benefits is constructive notice. Medicare is not required to send a notice of lien, the statute and regulations are notice themselves.[43] There is a double statutory penalty for failure to reimburse Medicare benefits under some circumstances.[44] The applicable Medicare regulations are found in 42 C.F.R. 411.20 et. seq. There is a regulatory formula for reducing the lien, which reduces Medicare's claim by the percentage that the claimant's fees and expenses bear to the recovery.[45] For example, if fees and expenses are 40% of the gross recovery, Medicare will accept 60% of its claim. The federal government claims to be authorized to sue any attorney who knowingly disregards a Medicare right of reimbursement based upon provisions in the Code of Federal Regulations.[46] In some circumstances, Medicare will waive its right of recovery.[47]

I. Federal Medical Care Recovery Act

Medical payments made on behalf of members of the military and their families are governed by 42 U.S.C. § 2651-52 and 32 C.F.R. § 537.1 *et seq.* The United States has a right to intervene or to independently recover from third party tortfeasors under 42 U.S.C. § 2651. The right to bring suit directly against the defendants must be enforced within six years.[48]

J. Crime Victims' Compensation Acts

Many states have created crime victims' compensation funds which may be used to pay for damage caused during criminal acts.[49] The statutes often create a statutory right of subrogation against the person responsible for the injury or death of a crime victim who receives a compensation award.

K. ERISA

Many ERISA insurers claim Federal status as if there were a monolithic Federal law uniformly applicable to all ERISA plans. Uninsured, self-funded group health plans maintained by multistate employers are governed by ERISA, and are not subject to the same state statutes and common law rules of subrogation. If the plan is an ERISA plan, Federal law generally applies, but it does not answer every question about the plan.

A preliminary issue is whether there is a self-funded plan. Correspondence with the plan trustees or administrator, and discovery of the plan documents must be undertaken in order to verify uninsured and self-funded status. The plan language must be reviewed. Some ERISA plans contain make-whole provisions, or provide that state law controls questions of interpretation, or are silent with respect to discretion to interpret the plan.

Interpretations of ERISA vary greatly among the federal circuit courts of appeal and among the states. In order to arrive at an opinion

about the application of an ERISA plan, one must examine the plan documents and the state and federal law applicable within the jurisdiction.

Some courts find that there is no authority for the court to entertain an ERISA subrogation case.[50] Other courts find that the make whole doctrine applies.[51] Another group of courts are opposed to the make whole rule under ERISA plans.[52] The variation of interpretations among the courts carries through to the ERISA common fund cases as well. Some courts apply the common fund doctrine.[53] Other courts do not apply the common fund doctrine in the ERISA context.

Attorneys disbursing funds subject to ERISA reimbursement claims should be aware of possible personal liability. In *Southern Council of Industrial Workers v. Ford*,[54] the court found that a remedy should be fashioned even though the attorney who failed to honor the ERISA plan's subrogation right was not an ERISA fiduciary. In *Hotel Employees & Restaurant Employees Int'l Union Welfare Fund v. Genter*,[55] an attorney distributing funds was held liable for failure to reimburse the ERISA fund.

L. Liens

Liens are created by various Oklahoma Statutes. By statutory definition, a lien is, "a charge imposed upon specific property, by which it is made security for the performance of an act."[56] This has been interpreted to mean that a lien is a legal right to satisfy a debt from a particular fund or item of property.[57] Equitable liens and constructive trusts appear to be recognized in Oklahoma despite language in some opinions which shows disfavor for them.[58]

Oklahoma hospital liens attach, "upon that part going or belonging to such patient of any recovery or sum had or collected or to be collected by such patient, or by his heirs, personal representatives or next of kin in the case of his death, whether by judgment or by settlement or compromise to the amount of the reasonable and necessary charges of such hospital for the treatment, care and maintenance of such patient in such hospital up to the date of payment of such damages."[59]

"...a lien is a legal right to satisfy a debt from a particular fund or item of property."

Hospital liens may apply to funds collected from personal injury cases.[60] The lien applies to monetary recovery from the one responsible for the injury. Hospital liens are limited to, "that part going or belonging to such patient."[61] Hospital liens apply whether the funds are recovered through judgment or settlement.[62] The amount of the hospital lien is for the charges that are reasonable and necessary for the treatment of the patient.[63] Oklahoma physician's liens are similar to hospital liens, but are covered by a different statute.[64]

Federal tax liens originate from 26 U.S.C. § 6321 *et seq*. Generally, liens in effect prior to filing notice of the Federal tax lien have priority over the Federal tax lien. Priority of security interests is specified in 26 U.S.C. § 6323. Even after notice of the Federal tax lien is filed, many other types of liens will take priority over the Federal tax lien. Notice of the Federal tax lien against personal property is filed in the office within the state in which the property subject to the lien is situated.[65] In Oklahoma, that is the office of the county clerk in the county in which the taxpayer lives.[66]

In Oklahoma, a judgment creates a lien on the real property of the debtor upon filing in the county in which the real estate is located.[67] Mechanics liens operate in a similar fashion.[68] According to § 142, they are to be filed in the office of the county clerk in the county in which the land is located within four months of the date upon which material or services used on the land was last furnished. However, the timing of filing mechanics liens has been the subject of considerable confusion and controversy.[69] Accordingly, the validity of any mechanics lien should be thoroughly investigated.

A lien is extinguished when the underlying claim for relief is extinguished by the general statute of limitations of 12 Okla. Stat. §95.[70] In *Fourth National Bank of Tulsa vs. Appleby*,[71] the Oklahoma Supreme Court addressed the applicability of 42 Okla. Stat. § 23 to a conflict involving the priority of a mechanic's lien

with respect to a materialman's lien. The Court held that § 23 required them to examine the statute of limitations applicable to the claims upon which the liens were based. The Court determined that the relationship between the parties was based on an implied contract, which was governed by a three-year statute of limitation.[72] The Court further held that the purpose of § 23 was that when a statue of limitations bars a debt, that bar serves to extinguish any lien securing the debt.[73]

Appleby stands for the proposition that 42 Okla. Stat. § 23 is to be interpreted as a time limitation on liens. In other words, when the obligation that the lien is based upon is extinguished by the general statute of limitations, Okla. Stat. tit. 12, § 95, then any lien based upon that obligation which has not been enforced is time barred as well, unless a more specific statute controls.

Conclusion

A settlement or final judgment is not always the end of a lawsuit. Often, it merely represents a point when new and different lien adversaries appear in the case. This article should provide a starting point of the many claims that must be considered on behalf of the injured; and a starting point for the many third party claims against settlement proceeds which must be taken into account during the settlement process.

1. Oklahoma Rule of Professional Conduct 1.3, Comment ("take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. . . zeal in advocacy"). *See also*, Oklahoma Rules of Professional Conduct, Preamble ("a lawyer can be a zealous advocate"). Cf., Oklahoma Rule of Professional Conduct 1.15 (pertaining to notification of persons with an interest in property and keeping property subject to claims of multiple parties separate).
2. 956 P.2d 148 (Okla. 1998).
3. 26 U.S.C. § 104.
4. *See, e.g., O'Gilvie v. United States*, 519 U.S. 79 (1996) (Non-compensatory punitive damages are subject to income tax); *Commissioner v. Schleier*, 515 U.S. 323 (1995) (settlements related to age discrimination are taxable); *United States v. Burke*, 504 U.S. 229 (1992) (settlements related to back pay in a sex discrimination case are taxable); *Bagley v. Commissioner*, 105 T.C. 396, aff'd 121 F.3d 393 (settlement allocated entirely to non-taxable compensatory tort damages was reallocated to taxable punitive damages).
5. 26 U.S.C. § 104(a)(2); 26 U.S.C. § 130.
6. 26 U.S.C. § 130(d).
7. Okla. Stat. tit. 12, § 3241.
8. 26 U.S.C. § 5891.
9. 12 Okla. Stat. 83.
10. *See, Strand v. Rasmussen*, 648 N.W.2d 95 (Iowa 2002) (trust with unfettered discretion to pay benefits rendered beneficiary ineligible to receive Medicaid benefits).
11. *See*, Okla. Stat. tit. 63, § 1-1708.1D.
12. Dobbs, *Remedies* §§3.6, 8.10 (West 1993).
13. *Denco Lines v. Hargis*, 229 P.2d 560, 564 (Okla. 1951) ("[T]he receipt of compensation by the injured party from a collateral source wholly independent of the wrongdoer would not operate to lessen the damages recoverable from the person causing the injury.")
14. *See*, Dobbs, *Law of Remedies* § 3.8(1) (West 1993).
15. *United States Fidelity and Guaranty Company v. Federated Rural Electric Insurance Corporation*, 37 P.3d 825, 2001 OK 81, ¶¶ 9-10.
16. *Mid-America Trailer Sales, Inc. v. Moorman*, 576 P.2d 1194 (Okla. Ct. App. 1977) (an insurance policy covering destroyed property is a contract of indemnity and to the extent the indemnitor bears a loss it is subrogated by operation of law to the indemnitee's right of action for the loss against a third party).
17. *Farmers Insurance Exchange v. Smith*, 83 Cal. Rptr.2d 911, 71 Cal. App. 4th 660 (1999) (The attorney is not the client's keeper).
18. *Id.*
19. *Id.*
20. Okla. Stat. tit. 36, § 6092.
21. *Burch v. Allstate Ins. Co.*, 977 P.2d 1057, 1065 (Okla. 1998).
22. 643 P.2d 302, 304-05 (Okla. 1982).
23. 927 P.2d 572 (Okla. 1996); *American Medical Security v. Josephson*, 2000 OK CIV APP 127, 15 P.3d 976 (non-ERISA case).
24. *Esparza v. Scott and White Health Plan*, 909 S.W.2d 548 (Tex. Ct. App. 1995).
25. *Id.*
26. *Equity Fire*, 927 P.2d at 576 n.5.
27. *Id.*
28. 841 P.2d 573 (Okla. 1992).
29. 1 P.3d 987, 2000 OK 21.
30. Okla. Stat. tit. 63, § 5051.1(C).
31. Okla. Stat. tit. 63, §§ 5051.1(D)(2), 5051.1(F).
32. Okla. Stat. tit. 63, § 5051.1(E)(1).
33. *Martin v. Rochester*, 642 N.W.2d 1 (Minn. 2002).
34. 244 F.3d 280 (2nd Cir. 2001).
35. *See, Strand v. Rasmussen*, 648 N.W.2d 95 (Iowa 2002) (trust with unfettered discretion to pay benefits rendered beneficiary ineligible to receive Medicaid benefits).
36. 42 C.F.R. § 411.54(c).
37. *See*, 42 U.S.C. § 1395cc(a)(1)(A)(i).
38. *Thompson v. Goetzmann*, 315 F.3d 457 (5th Cir. 2002), aff'd ___ F.3d ___, No. 02-10198, (5th Cir. July 7, 2003).
39. *Thompson v. Goetzmann*, 315 F.3d 457 (5th Cir. 2002), aff'd ___ F.3d ___, No. 02-10198, (5th Cir. July 7, 2003); 42 U.S.C. § 1395y(b)(2)(A).
40. 42 C.F.R. § 411.50.
41. 42 U.S.C. § 1395y(b)(2)(A); 42 C.F.R. § 411.52.
42. Medicare makes and recovers its payments pursuant to 42 U.S.C. § 1395y and 42 C.F.R. Part 411.
43. 42 U.S.C. 1395(y)(b); 42 C.F.R. 411.20, 411.23, 411.24, and 411.26. *See also, U.S. v. Bartholomew, 266 F.Supp.* 213 (W.D. Okla. 1967).
44. 42 U.S.C. 1395(y)(b)(3)(A).
45. 42 C.F.R. 411.37.
46. 42 C.F.R. 411.24.
47. *See*, http://www.hcfa.gov/pubforms/13_int/a00.htm (§ 3418.13); 42 U.S.C. §§ 1395gg(c), 1395y(2)(B)(iv); 42 C.F.R. § 405.355; 20 C.F.R. §§ 404.506 - 404.512.
48. 28 U.S.C. § 2415(a).
49. *See, e.g.*, Okla. Stat. tit. 21, § 142.1 et seq.; Kan. Stat. Ann. § 74-7301 *et seq.*
50. *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 US. 204 (2002); *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) (ERISA plan could not seek monetary damages, equitable relief only is permitted per Mertens, 508 U.S. 248, therefore, dismissed); *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000) (ERISA fiduciary could not show it came within one of the nine categories listed in 29 U.S.C. § 1132(a)(3); additional agreement did not alter this, therefore, dismissed).
51. *Equity Fire and Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996), *supra; Schultz v. NEPCO Employees Mut. Benefit Ass'n, Inc.*, 190 Wis.2d 742, 528 N.W.2d 441 (Wis. Ct. App. 1994) (federal common law make-whole rule applies to ERISA plan which fails to set forth priority rules for third party settlements or to provide fiduciaries with discretion to construe the plan); *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997) (make-whole rule applies where ERISA plan does not expressly disavow it); *Barnes v. Independent Automobile Dealers Ass'n of Cal. Health & Benefit Plan*, 64 F.3d 1389 (9th Cir. 1994) (make-whole rule should be applied as the default federal common law rule in the absence of ERISA plan language defining priority rules).
52. *Bollman Hat Company v. Root*, 112 F.3d 113 (3rd Cir.1997) (ERISA plan need not contribute to the legal expenses of a plan participant's recovery against a third party); *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), *cert. denied*, 510 U.S. 916, 114 S.Ct. 308, 126 L.Ed.2d 225 (1993) (federal common law rule preventing full reimbursement would not be adopted where the clear language of ERISA plan requires full reimbursement without deduction for attorney's fees).

53. *Wal-Mart v. Wells*, 213 F.3d 398 (7th Cir. 2000) (ERISA plan must pay its share of attorneys fees incurred in making a recovery from a third party tort-feasor despite contrary plan language); *Smith v. Wal-Mart Associates Group Health Plan*, 238 F.3d 424 (6th Cir. 2001) (Wal-Mart entitled to recover only two-thirds of its expenditures where employee paid a one-third contingent fee); *Scholtens v. Schneider*, 173 Ill.2d 375, 671 N.E.2d 375 (1996) (offset of a tort victim's attorney's fees and costs against an ERISA plan trustee's request for medical expense subrogation); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990), *cert. denied*, 498 U.S. 982, 111 S.Ct. 512, 112 L.E.2d 524 (1990) (reimbursement of plan member's attorney's fees is required under theory of unjust enrichment to other plan beneficiaries); and *Serembus v. Mathwig, 817 F. Supp.* 1414 (E.D. Wis. 1992). See also, *Bollman Hat Co. v. Root*, 112 F.3d 113 (3rd Cir. 1997); *Ryan v. Federal Express Corp.*, 78 F.3d 123 (3rd Cir. 1996); *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997); *Kagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997); *Waller v. Hormel Foods Corp.*, 120 F.3d 138 (8th Cir. 1997).

54. 83 F.3d 966 (8th Cir. 1996).

55. 50 F.3d 719 (9th Cir. 1995).

56. Okla. Stat. tit. 42, § 1.

57. *See, Williamson v. Winningham*, 199 Okla. 393, 186 P.2d 644 (1947).

58. *See, Phoenix Mutual Life Insurance Co. v. Harden*, 596 P.2d 888 (Okla. 1979).

59. Okla. Stat. tit. 42, § 43.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Okla. Stat. tit. 42, § 46.

65. 26 U.S.C. § 6323(f).

66. Okla. Stat. tit. 68, § 3403.

67. Okla. Stat. tit. 12, § 706.

68. Okla. Stat. tit. 42, § 142.

69. *See*, Okla. Stat. tit. 42, § 142.1.

70. *See*, 42 Okla. Stat. §23.

71. 864 P.2d 827 (Okla. 1993).

72. *Id.* at 832-833.

73. *Id.* at 834.

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