

SELECT CASES & RESULTS



Philip Sieff

PHILIP SIEFF

\$275,000 jury verdict for male with mild reactive airway disease following anhydrous ammonia exposure.

\$239,000 jury verdict for client hit by car while aiding motorist in distress.

\$3.8 million settlement to cover a woman's current and future medical expenses and to cover the creation of a life-care plan to help her adapt to the severe injuries she sustained in an automobile collision.



William Maddix

WILLIAM J. MADDIX

\$5.6 million settlement for male in case involving delay in treating suspected bacterial meningitis and performance of an ill-advised spinal tap that caused a brain herniation.



Chris Messerly

CHRIS A. MESSERLY

\$1.3 million policy limits settlement for failure to diagnose airway obstruction in infant who had partially swallowed a Fentanyl patch resulting in brain damage and developmental delays.

\$800,000 settlement for young man as a result of negligent back surgery and the removal of spinal nerve tissue by a neurosurgeon resulting in permanent pain.

\$725,000 settlement for death of an adult child killed on New Year's Day when the drunk and drug-impaired driver of the snowmobile on which she was a passenger crashed into a dock at 90 miles per hour.

MASS TORT EMAIL ALERTS

If you would like to receive breaking news related to defective medical devices and pharmaceuticals and have not already signed up, please email kldirks@rkmc.com.

MEDICARE UPDATE: RECENT CHANGES IN MEDICARE SUBROGATION ISSUES FOR LIABILITY CLAIMS



By Brandon E. Vaughn

When handling a liability case, it is important early in the case to identify who has paid any medical bills, particularly if Medicare is involved. Working with Medicare can be challenging. On February 21, 2012, Medicare implemented a program that will assist attorneys in calculating Medicare's subrogation lien for faster processing of claims. The program is called "Option to Self-Calculate Your Final Conditional Payment Amount Prior to Settlement."

Early in the process, contact Medicare by notifying the Coordinator of Benefits Contractor ("COBC")¹. The COBC will identify what bills Medicare has paid on behalf of your client so you can determine what bills are related to your client's injury and what bills are unrelated. Once you have made this determination, you can calculate your conditional payment amount. You can do this by following the process outlined below.

Medicare recommends starting the self-calculation option approximately 5 months before you anticipate resolving your case. There are certain eligibility requirements to participate in the self-calculation process. First, the liability settlement, judgment, award, or any other payment must be for a physical trauma-based injury (cannot be for ingestion, exposure or medical implant). Second, the anticipated recovery cannot exceed \$25,000. Next, the date of the incident (injury) must have occurred six months before the calculation of the conditional payment amount. Finally, the beneficiary must show there is no further anticipated treatment. The beneficiary can demonstrate no anticipated future medical care in two ways: 1) A written physician attestation that no future care or treatment is required, or 2) A written certification from the beneficiary stating that no medical treatment related to their cases has occurred for at least 90 days before submitting the self-calculated conditional payment and the beneficiary expects no further care. If the beneficiary does participate in the self-calculation option, Medicare will ask the beneficiary to give up the right to appeal the amount or existence of the debt. However, the beneficiary will keep the right to pursue waiver of recovery.

If the beneficiary elects to pursue the self-calculated conditional payment amount, there are certain documents and language that must be used in the request. Those documents can be found online.² Once the self-calculated conditional payment amount is submitted, Medicare has 60 days to respond to the request. Medicare will either agree with the self-calculated amount or it won't. Medicare will then issue its decision and provide its final demand amount provided the case is resolved within 60 days from the final demand, and the case is resolved for \$25,000 or less. Upon receipt of the settlement information, Medicare will then allow for a reduction in its final demand amount for attorneys fees and costs, as appropriate.

It is hoped that Medicare will increase the \$25,000 settlement cap in the self-calculated conditional payment option in the near future. With any change in government units, it will be slow, but there is optimism that eventually this process will be useful for many attorneys handling cases in which Medicare has a subrogation interest.

1. COBC can be contacted by telephone at 1-800-999-1118, Monday-Friday 8am-8pm (EST).

2. Specific forms and documents and further information on Self Calculated Conditional Payment Amount can be found at <http://www.msprc.info/forms/SelfCalculatedFinalCP.pdf>.

MASS TORT DEPARTMENT RECEIVES TIER 1 RATING

For a second year in a row, Robins, Kaplan, Miller & Ciresi L.L.P.'s Mass Tort group has been recognized as a top tier litigation practice by U.S. News Media Group and Best Lawyers.¹ In addition to earning a Minneapolis Tier 1 rating for "Mass Tort Litigation/Class Actions – Plaintiffs," the firm is one of only 12 firms nationwide – and the *only* firm in Minnesota – to receive a National Tier 1 rating in this category.

According to U.S. News Media Group and Best Lawyers, the 2011-2012 rankings showcase law firms ranked nationally in one or more of 75 major legal practice areas and in metropolitan or state rankings in one or more of 119 major legal practice areas.



PRODUCT LIABILITY INVESTIGATIONS

FDA HAS CONCERNS ABOUT ALL TYPES OF METAL-ON-METAL HIP IMPLANTS

Traditional Metal-on-Metal (MoM) total hip replacement implants consist of a femoral head ball, femoral stem, and an acetabular cup – all made of metal materials. The FDA recommends that any MoM hip patient with pain in the groin, hip, or leg; swelling at or near the hip joint; or a limp or change in walking ability be evaluated by their orthopedic surgeon promptly due to unique risks of MoM implants.² Many studies report alarmingly high failure rates of MoM devices such as the now-recalled DePuy ASR hip implants and the DePuy Pinnacle hip implants, failures which may require early revision surgery following metal debris generation, metallosis, inflammation, and tissue damage.³ Litigation is proceeding against many MoM manufacturers in state and federal courts, and the firm is now investigating all MoM devices.

FOSAMAX LITIGATION CLAIMING JAW DEATH AND FEMUR FRACTURES

Fosamax, used for the prevention and treatment of osteopenia and osteoporosis, has caused many people to suffer painful osteonecrosis (bone death) of the jaw and atypical femur fractures since its introduction in 1995.⁴ These femur fractures often require surgery and involve a long recovery and rehabilitation process. Our attorneys are actively litigating cases in the Fosamax jaw injury MDL in New York and in the recently-established Fosamax femur fracture MDL in New Jersey.

ZIMMER NEXGEN FLEX KNEE IMPLANTS LITIGATION

The Zimmer NexGen Flex knee replacement system, manufactured by Zimmer Inc., is marketed as a line of "high-flex" knee implants designed to give knee replacement recipients greater range of motion.⁵ However, studies have shown that these high-flex implants can lead to pain, loosening, and instability in the knee, requiring removal and replacement of the implants.⁶ Our firm is currently litigating these claims in the MDL in Illinois.

1. *Being named to the list or receiving the award is not intended and should not be viewed as comparative to other lawyers or to create an expectation about results that might be achieved in a future matter.*

2. U.S. Food and Drug Administration, *Medical Devices: Concerns About Metal-on-Metal Hip Implant Systems*, available at <http://www.fda.gov>.

3. See e.g., FS Haddad et. al, *Metal-on-metal bearings: the evidence so far*. J. BONE JOINT SURG. [Br], 2011 May; 93(5):572-9; *Hip Implant Complaints Surge, Even as the Dangers Are Studied*, Aug. 22, 2011, available at nytimes.com.

4. See ODS Postmarketing Safety Review, Department of Health and Human Services, Public Health Service, U.S. Food and Drug Administration, Aug. 25, 2004 and U.S. Food and Drug Administration, *Safety Announcement, Additional Information for Patients, Additional Information for Healthcare Professionals, Data Summary* (October 2010), both available at www.fda.gov.

5. See www.zimmer.com.

6. See e.g., H. S. Han et al., *High Incidence of Loosening of the Femoral Component in Legacy Posterior Stabilised-Flex Total Knee Replacement*, 89-B J. BONE JOINT SURG. 1457 (2007); Sung-Do Cho, et al., *Three- to Six-year Follow Up Results After High-Flexion Total Knee Arthroplasty: Can We Allow Passive Deep Knee Bending?*, 19 KNEE SURG. SPORTS TRAUMATOL ARTHROSC. 899 (2011). Note that not all Zimmer NexGen knee products have shown a high failure rate. Products of particular interest are those that are "Flex" or "High-flex" products.

OUR PEOPLE



KATE E. JAYCOX, ASSOCIATE

Kate Jaycox joined Robins, Kaplan, Miller & Ciresi L.L.P. as a summer associate in 2003 and became an associate in 2004 after graduating from University of Minnesota Law School.

A Twin Cities native, Kate always planned to practice law, inspired by her father's successful family law practice. But, she took a detour before law school and spent seven years fundraising and managing political campaigns across the country. Kate's first career taught her the value of fighting the good fight against the toughest opponents, a skill which has served her well when litigating complex product liability cases against the world's largest pharmaceutical and medical device companies.

Currently, Kate represents individuals & families injured by Fosamax, Imprelis, and defective hip and knee implants. Kate is active on the DePuy ASR Law and Briefing Committees and Discovery Committees. In addition to other litigations, Kate was a key team member in representing 280 clients harmed by the Parkinson's and Restless Leg Syndrome drug Mirapex, cases which confidentially settled in 2008 after a \$8.2 million jury verdict in the first bellwether trial. The Mirapex litigation involved claims of failing to warn of the risk of compulsive behaviors, including pathological gambling.

Since joining the firm, Kate has been equally devoted to *pro bono* representation of children and Guardians ad Litem in complex child protection matters, including successfully arguing before the Court of Appeals, negotiating a voluntary termination of parental rights on the eve of trial, and negotiating a contested pre-adoptive placement in the middle of trial – all in one case governed by the Indian Child Welfare Act spanning over three years.

Kate serves on Board of Governors for the Minnesota Association for Justice and is a past chair of the Women for Justice. In February, she was appointed to the American Association for Justice Board of Governors, and serves as a Minnesota State Delegate. Kate also sits on the Board of the Minnesota Justice Foundation, a non-profit organization devoted to creating *pro bono* opportunities for law students to meet the legal needs of the disadvantaged. Kate was selected as a Rising Star by *Minnesota Law and Politics* in 2010 and 2011.

Kate lives in Southwest Minneapolis with her husband, Mike Hatting, and two daughters, ages 4 and 8, whose budding debate skills delight and challenge her every day.



SUSAN M. STYLE, SENIOR PARALEGAL

Sue joined Robins, Kaplan, Miller & Ciresi, L.L.P. as a Senior Paralegal in July 1987. She has worked on many of the firm's large Mass Tort cases on behalf of plaintiffs, including the Union Carbide plant explosion in Bhopal, India; breast implant, heart valve, and artificial hip litigation; and has been to trial on many of these cases, including breast implant, Minot train derailment and Mirapex.

Sue is responsible for administration of large, document-intensive files and assisting with preparation of discovery, case management, motion practice and trial of these matters. She has also served for a time as the firm's Paralegal Manager during her 25 year career at the firm, mentoring paralegals, managing workloads and liaising between the attorneys, paralegals and staff.