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Health Law

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What Every Litigator Needs to Know About Current Medicare Issues

Everyday, litigators address and satisfy Medicare liens in personal injury claims. Litigators are now faced with the question of whether they have an obligation to protect Medicare from future medical expenses that the plaintiff may incur after settlement or judgment. There is a great deal of uncertainty and only unofficial guidance on this issue.

Litigators must also pay particular attention to Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 ("SCHIP"), PL 110-173, codified at 42 U.S.C. § 1395y. Pursuant to SCHIP, certain liability insurers, self-insurers, no-fault insurers and workers' compensation insurers must determine the Medicare beneficiary status of their claimants and report Medicare claims to the Secretary of the Department of Health and Human Services after a settlement, judgment, award or other payment. While the first reporting period has recently been postponed, litigators should continue to collect Medicare information in anticipation of the impending reporting requirements.

The Medicare Secondary Payer Act

In 1980, the Medicare Secondary Payer Act ("the Act") was passed to ensure that Medicare was not making payments for medical expenses when other insurance was available. 42 C.F.R. § 411.40 (2000). The Act provides that Medicare will not pay for medical expenses covered by workers' compensation, automobile liability, liability insurance policies, or no-fault insurance policies. 42 U.S.C. § 1395y(b)(2). Such liability plans are primarily responsible for payment. Medicare is secondary to all other available healthcare payment sources and only available when those sources are exhausted. 42 U.S.C. §§ 1395y(b)(2) and 1862(b)(2)(A)(ii). In addition, Medicare is vested with subrogation of rights as well as enforcement provisions for violations of the Act. 42 U.S.C. § 1395y(b)(2)(B)(iii), (iv).

Early litigation over how the Act applies to tort claims centered on Medicare's ability to recover its liens in tort settlements. The government's efforts were defeated in many instances when courts found that tort defendants were not obligated to pay promptly under the Act. See *United States v. Baxter Int'l, Inc.*, 345 F.3d 86 (11th Cir. 2003). Upon revisions to certain language in the Act, pursuant to the Medicare Modernization Act, PL 108-173, Medicare's ability to recover its liens is less of an issue now. Today, however, we face issues associated with Medicare set asides for future medical expenses in civil liability claims.

Future Medical Expenses and Civil Liability Claims

Unlike workers' compensation cases, for which future medical expenses are specifically addressed in 42 C.F.R. §§ 411.40 – 411.47, there is no clear policy regarding Medicare set asides in liability settlements. Unfortunately, the Center for Medicare & Medicaid Services (CMS) provides only unofficial guidance.

Representatives of the CMS Chicago Regional Office advise that CMS's position is that the Act requires liability insurers, including auto liability insurers, to protect Medicare's interest in future medical expenses if a future-medical allocation is part of the settlement. Other CMS regional offices have issued similar statements. Therefore, it appears that CMS interprets the Act to require litigants to protect Medicare's interest in settlements or satisfactions of judgment in liability claims. CMS, however, lacks a regulatory framework upon which to base enforcement. Litigants must therefore rely on informal policy statements until regulations are promulgated similar to those in workers' compensation claims.

Even assuming CMS obtains statutory authority to require litigants to protect Medicare's interest in future medical expenses, there appears to be no such obligation unless the settlement includes a specific allocation for future medical expenses. Today, litigants rarely allocate settlement funds to a plaintiff's particular element of damages. Rather, most settled cases contain only a lump-sum payment for all forms of damages. Medicare currently lacks regulatory authority to reapportion a settlement in a personal injury case that has been resolved by a lump-sum payment without a specific allocation for future medical expenses. Therefore, not only is the policy associated with set asides unclear, but also the authority to require set asides is uncertain as well.

As it stands, litigators have several options in attempting to comply with set-aside issues. Litigators may take a more cautious approach and specifically allocate settlement funds toward future medical expenses in all cases involving a current or future Medicare beneficiary. A less cautious approach is to use set-aside arrangements only in cases where damages include substantial future medical expenses and the plaintiff is Medicare eligible. Perhaps the least cautious approach would be to use a Medicare set aside only if the settlement or judgment specifically requires an allocation of future medical expenses, for example, in cases involving mentally disabled adults and minors.

No matter how cautious litigants proceed, we are left with unresolved issues as to how to properly protect Medicare's interest in future medical expenses.

The Impact of SCHIP

Medicare issues are even further complicated by the enactment of SCHIP. SCHIP creates mandatory reporting requirements for claims involving Medicare-eligible individuals. Such requirements are imposed upon both liability insurers, as well as workers' compensation insurers.

The steps for compliance include: (1) on-line registration; (2) submitting test files; and (3) reporting required data elements on a quarterly basis. The first reporting period was set to begin April 1, 2010, or the second quarter of 2010. However, on February 17, 2010, CMS postponed the first reporting period until January 1, 2011, or the first quarter of 2011. http://www.cms.hhs.gov/MandatoryInsRep/04_Whats_New.asp#TopOfPage.

It is worth noting that SCHIP does not explicitly change any standards governing Medicare set-aside requirements. In fact, SCHIP did not change or remove any existing Medicare Secondary Payer rules or requirements. Rather, these requirements constitute only a further effort by Medicare to enforce the Act. Nothing indicates that SCHIP otherwise affects future medical expenses in liability claims.

Conclusion

While CMS has made informal statements about Medicare set asides in liability cases, it has failed to promulgate definitive policies. Consequently, litigants face uncertainty about obligations to Medicare. Litigants may take any of a number of approaches ranging from not using set asides at all, to using them in every personal injury settlement involving Medicare-eligible individuals with future accident-related medical expenses.

Finally, litigants should be aware that SCHIP's reporting period has been postponed until January 1, 2011. However, litigants should remember that CMS could still require initial reporting to include settlements from

July 1, 2010 through December 31, 2010. As a result, litigants should continue to obtain information associated with a plaintiff's Medicare status in anticipation of the impending reporting requirements.

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