



WHAT ABOUT MSP: Settling Liability Cases Under the Medicare Secondary Payer Act

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EDITOR'S NOTE:

This is the first of two articles dealing with Medicare in the context of 3rd party litigation and liens. In our fall issue, the author will discuss the consideration of future medicals in liability settlements and the appropriate application of Medicare set-asides.

The Medicare Secondary Payer Act (MSP) has caused massive confusion for the handling of personal injury claims. The MSP was initially designed with the goal of reducing federal health care costs.¹ However, since enactment, it has had many unexpected and unfortunate side effects, including frustrating settlement negotiations due to disparate understanding of compliance requirements. This article will clarify misconceptions regarding whether Medicare must be included on settlement checks for Medicare beneficiaries (it does not) and address some best practices to protect defendants in liability cases from Medicare claims.

WHAT IS MEDICARE SECONDARY PAYER?

Often, when a Medicare beneficiary has suffered an injury, Medicare will make an early, conditional payment for services and treatment because it is difficult to immediately ascertain whether that treatment should have been paid for by another entity, such as a liability, group health, workers compensation, or no-fault

insurance plan, or a self-insurer. These entities are considered “primary” payers and Medicare is a “secondary” payer for medical services related to the claim. When Medicare makes a conditional payment for medical services rendered as a result of an injury caused by another party, the government, through Medicare, has a right to recover the conditional payment amount against any entity responsible for making the primary payment.²

In the event that Medicare is not reimbursed, the MSP authorizes a cause of action against any entity that received primary payments such as “a beneficiary provider, supplier, physician, [or] attorney.”³ This cause of action provides for double damages as a penalty for the failure of the primary payer to timely reimburse Medicare. In addition, there is also a private cause of action which allows private parties to also seek double damages, to encourage other parties to enforce Medicare’s rights and ease the fiscal burden on Medicare.⁴ With potential exposure to suit from either Medicare or a private party, any settling parties should carefully consider the repayment to

Medicare of any existing liens, and ensure that any settlement provides an efficient guarantee of Medicare reimbursement.

MEDICARE AS PAYEE ON SETTLEMENT CHECK

Many practitioners recognize that Medicare’s statutory right to reimbursement must be considered in settlement negotiations. However, there is a common misconception that Medicare must be included as a payee on settlement checks to comply with MSP. Parties will frequently reach a settlement without discussing Medicare treatment, and then an insurer or defendant will insist that Medicare be included on the settlement check, prompting disagreement and occasionally further litigation regarding enforcement of the settlement terms.

Recently, in *Karpinski v. Smitty’s Bar, Inc.*, the California Court of Appeal, First Appellate District, addressed this specific issue and followed a trend in other jurisdictions to hold that there is no

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requirement that Medicare be included as a co-payee on a settlement check unless such inclusion is included as a settlement term by the parties.⁵ In *Karpinski*, the plaintiff was injured by customers of Smitty's Bar and Medicare made payments for the plaintiff's medical treatment. The plaintiff filed suit against Smitty's Bar for negligently serving the other customers and for allowing the customers to remain at the bar. Smitty's Bar and the plaintiff agreed to settle the claim for \$40,000 and also agreed that the plaintiff would indemnify Smitty's Bar and its insurer for claims or liens against the settlement amount including claims by Medicare. However, the settlement agreement did not require that Medicare be included on the settlement or that existing liens be satisfied prior to payment of the settlement funds.

Subsequently, Smitty's Bar and its insurer refused to issue a check without either including Medicare as a payee or receiving a confirmation that all existing liens had been satisfied from the lienholders. The plaintiff then brought a motion for entry of judgment to enforce the settlement which was granted and Smitty's Bar appealed, claiming that satisfaction of outstanding liens was a condition precedent to payment of the settlement funds. The *Karpinski* court rejected Smitty's Bar's interpretation and determined that if Smitty's Bar and its insurer "were so concerned about their potential liability ... to Medicare ... they could have negotiated for inclusion of terms in the settlement agreement requiring ... inclusion of the board and Medicare as payees on the settlement check."⁶

Karpinski makes clear that absent a prior agreement by the parties to include Medicare on a settlement check, plaintiff's counsel may reject a *post-settlement* request to include Medicare as a payee, leaving a settling defendant and/or its insurer open to a potential claim or lawsuit by Medicare if the plaintiff does not reimburse Medicare from the settlement funds.⁷ While defendants and insurers may have remedies in the form of indemnity provisions within settlement agreements, such provisions will not prevent Medicare, or other private parties, from seeking reimbursement

directly from the responsible primary payer including double damages. Even if indemnity is available, the complication of additional litigation will increase the costs of settlement for all parties.

It should be noted that while *Karpinski* enforced the settlement despite the disagreement of the parties, other courts have invalidated settlements based on disagreements of the parties as to whether Medicare would be included as a co-payee on the check.⁸ This potential invalidation of settlements highlights the importance of including Medicare discussion early in settlement negotiation and clarifying each party's obligations before the settlement is executed.

SO HOW CAN WE SETTLE?

In the event that the opposing party rejects requests to include Medicare as a payee, or to provide proof of lien satisfaction in advance of settlement payment, the first and easiest solution is to educate opposing counsel of the potential liability of every party to the settlement. It may be that plaintiff's counsel is unaware that they may be personally liable for a failure to reimburse Medicare pursuant to a liability settlement.

In some instances, an opposing party may entirely refuse to cooperate to include Medicare as a payee or to provide confirmation that liens have been completed. In these cases, a settlement may not be in the client's best interest as it may expose a client to further exposure for reimbursement of existing liens. In this scenario, a defense attorney should counsel his or her client, and thoroughly explain the details of liability to Medicare, ensuring that the client understands the potential double liability for unsatisfied liens. Many clients will not understand that such liability exists and continues beyond the date of settlement.

When it comes to Medicare Secondary Payer, the best course of action is to educate yourself, your client, and opposing parties. Once everyone understands the obligation to consider Medicare's interests and the risks for failure to comply with the MSP,

it will be much easier to determine the best solution for Medicare's interests. ☐

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ENDNOTES

- 1 *Baptist Mem'l Hosp. v Pan Am. Life Ins. Co.*, 45 F.3d 992, 997 (6th Cir. 1995).
- 2 42 U.S.C. § 1395y(b)(2)(B)(ii).
- 3 42 C.F.R. § 411.24(g); see also *U.S. v. Harris*, 2009 WL 891931 (N.D. W.D.Va. March 26, 2009) *aff'd*, 334 F. App'x 569 (4th Cir. 2009) (personal injury plaintiff's attorney held individually liable for Medicare reimbursement).
- 4 42 U.S.C. § 1395y(b)(3)(A).
- 5 *Karpinski v. Smitty's Bar, Inc.*, 2016 WL 144533816, C. D.O.S. 3897 (Cal. Ct. App. Apr. 12, 2016).
- 6 *Id.* at *7.
- 7 42 C.F.R. § 411.24(i) ("If Medicare is not reimbursed [by the plaintiff], the primary payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party.").
- 8 See, e.g., *Tomlinson v. Landers*, 2009 WL 1117399 (M.D. Fla. April 24, 2009).



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