RISK MANAGEMENT RESOURCES

ARTICLES

New Medicare Secondary Payer Enforcement Rules: Effect on Counsel for Plaintiff and Defendant

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New Medicare Secondary Payer Enforcement Rules: Effect on Counsel for Plaintiff and Defendant

Medicare was established by Title XVII of the Social Security Act in 1965 to provide Federal health insurance for the elderly (anyone over age 65), the disabled (regardless of age), and individuals with End-Stage Renal Disease regardless of age. The Medicare Secondary Payer Act was passed in 1980, and is the federal government's attempt to secure the financial well-being of the Medicare Program by providing a remedy by which Medicare can recover its payments for medical services related to claims in all lines of insurance. Medicare is a "secondary payer" with respect to medical expenses incurred as a result of injury caused by the negligence of another. Being a secondary payer, Medicare is entitled to reimbursement for its payment. Medicare's payments are referred to as "conditional payments," and are made upon the condition that they will be repaid once payment is received from the "primary payer." Such primary payers include liability insurance, self-insurance, medical payments, uninsured motorist coverage and underinsured motorists coverage. And here's the important point: Medicare has a direct right of action against any entity who made payment and any beneficiary or attorney who received payment and failed to reimburse Medicare for its payments. (42 C.F.R. section 411.24(g).

The foregoing is nothing new to personal injury lawyers. Plaintiffs' lawyers are all too familiar with dealing with Medicare liens. However, Congress has enacted new reporting requirements for insurance companies primarily that are designed to alert Medicare to the existence of all claims and settlements involving a Medicare beneficiary, thus improving Medicare's reimbursement potential. The new reporting requirements are codified in Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007. Beginning January 1, 2011, insurers will begin reporting the existence of potential claims involving Medicare recipients directly to Medicare. And make no mistake; insurers will fulfill their reporting obligations because the law includes a penalty of $1,000 per day/per case for failure to report claims and settlements involving a Medicare recipient. Medicare will know more than ever before about situations in which Medicare should be secondary and about sources of reimbursement. This means it is more important than ever for both plaintiffs' lawyers and defense lawyers to be alert to potential Medicare liens, and to work with Medicare from the beginning of the case to protect Medicare's lien. Failure to do so could result in the lawyer or insurance company being directly liable to Medicare for reimbursement of Medicare's payments.

One of the most frequent problems we see at Lawyers Mutual with respect to Medicare liens is the plaintiff's lawyer waiting too long to involve Medicare. Oftentimes, lawyers will wait until settlement is imminent before worrying about a potential Medicare lien. This is too late. You should determine during the intake process whether or not your client is a Medicare beneficiary. You should then immediately set up your client's claim with Medicare. Doing this early on will give you the necessary time before settlement to work out any disagreements you may have with Medicare over the correct amount of Medicare's reimbursement claim. Waiting until settlement is imminent will only complicate and delay settlement of the case. There are a number of important steps along the way in successfully working with Medicare, and those steps are listed on the attached **CHECKLIST**.

Lest defense lawyers think the new Medicare reporting requirements are a wakeup call for only plaintiffs' lawyers, remember that the reporting requirements are directed primarily at insurers, the defense lawyer's client. Defense lawyers have a role in gathering and providing the necessary data to their insurance company clients so that the insurance company can comply with its reporting obligations. By being alert to potential Medicare reimbursement claims early on, defense counsel, working with plaintiff's counsel, can successfully resolve Medicare's reimbursement claim and avoid delays in settlement, as well as potential liability or penalties resulting from failing to report a claim to Medicare and failing to protect Medicare's right of reimbursement.

CHECKLIST

1. Identify Medicare beneficiaries
2. Get a copy of client's Medicare card and have client sign a Proof of Representation form
3. Set-up client's claim with Medicare
   a. Call Medicare Coordination of Benefits (COB) Contractor at 1-800-999-1118 between 8:00 a.m. and 8:00 p.m. EST, Monday through Friday, except holidays
   b. Be prepared to provide your client's name, address, date of birth, HIC number, date of loss, liability insurer and description of injuries.
4. Medicare assigns a lead contractor – our lead contractor for auto and other liability claims will be: MSPRC Auto/Liability, P.O. Box 33828, Detroit, MI 48232-3828 [1-866-677-7220]
5. Receive Rights and Responsibilities letter
6. Request Conditional Payment Letter (CPL)
   a. Send Correspondence Cover Sheet and Proof of Representation to MSPRC to ensure you receive a copy of the CPL
   b. Within 65 days of the Rights and Responsibilities letter, receive CPL. Ensure that the file is labeled "Liability." [Not no-fault]. Review who received copy of the CPL.
7. Once an initial CPL is received, review it for accuracy. Mark up inaccurate charges and return to MSPRC with a letter outlining why charges should be removed.
8. Review conditional payments on-line at www.mymedicare.gov and/or request periodic updated CPLs from MSPRC.
9. After settlement:
   a. Request final itemization from MSPRC (or review on-line)
   b. Check balances to confirm MSPRC's itemization is accurate
   c. Get release signed by the client
   d. Notify Medicare of the settlement by sending a letter requesting the final demand letter along with the Final Settlement Document Detail form, a copy of the release, and a copy of your itemized costs.
10. Receive final demand letter and send check within 60 days.

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*Checklist prepared by **Chris Nichols**, Nichols Law Firm. Chris's practice focuses on plaintiff's personal injury work and he is the author of Medicare and Medicaid Reimbursement from the Plaintiff's Lawyer's Perspective published by the N.C. Advocates for Justice. Chris can be reached at 919.512.0212 or www.nicholstriallaw.com. Follow his blog at www.nctriallawblog.com.*