

NEW MEXICO INJURY ATTORNEY BLOG

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Eleventh Circuit Addresses Medicare's Responsibilities in Lien Negotiation

The Eleventh Circuit Court of Appeals has shed some light on a growing and extremely confusing topic, Medicare lien reimbursement in personal injury actions.

The underlying cause of action in *Bradley v. Sebelius* was a wrongful death action initiated as a result of nursing home negligence. The estate for the deceased was able to settle the claims with the nursing home at insurance policy limits of \$52,500. As is often the case with underinsured tortfeasors, the \$52,500 policy limits were grossly inadequate to cover the damages associated with the wrongful death.

This did not stop Medicare from asserting a lien for the \$38,875.08 in medical benefits paid by Medicare prior to death. Medicare refused to negotiate the lien forcing the estate to take the matter to probate court for an allocation of the settlement funds. Medicare then refused to participate in the probate proceedings standing by its \$38,875.08 lien. Based upon principles of equity, the probate court allocated only \$787.50 for recovery of medical expense. The amount reflected a pro rata reduction in the lien in proportion to the insurance policy limits to the full value of the wrongful death losses.

Naturally, despite refusing to participate in the proceedings, Medicare refused to accept the allocation insisting on full recovery. Medicare appealed to federal district court obtaining a favorable decision. The Eleventh Circuit Court of Appeals reversed holding Medicare to the probate court decision.

The Court addressed a number of issues. First, the Court addressed the fact that the wrongful death cause of action belonged to the estate, not the deceased. The Court suggested that the surviving children had independent claims for loss of consortium and companionship beyond the claims of the deceased. In essence, the Court suggested that these losses alone exceeded the insurance policy limits leaving nothing for Medicare to attach.

Perhaps more importantly, the Court addressed a growing problem presented by Medicare's approach to lien recovery. Medicare basically refused to participate in the process refusing to negotiate its lien and forcing the estate to probate. It further refused to participate in the probate proceeding. All the while, Medicare stood firm on its lien

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despite the fact that the total available policy limits and the settlement thereon were grossly insufficient to compensate all parties to the claims. Medicare did this through interpretations of its policy manuals.

The Court would not stand for these tactics. First, the court stated that agency policy statements, manuals, and enforcement guidelines are not entitled to the force of law. Next, the Court addressed the obvious breach of public policy in allowing Medicare's tactics. The Court pointed out that the attorney for the estate acted in a sensible and cost effective manner settling the claims at policy limits. The Court recognized Medicare's position would either force cases into litigation or allow tortfeasors such as the negligent nursing home to completely escape liability. In essence, the Court recognized that most attorneys and plaintiffs would be better served simply walking away completely in low policy limit cases where Medicare was involved. The Court put it succinctly stating "Forcing counsel to file a lawsuit would incur additional costs, further diminishing the already paltry sum available for settlement. This flies in the face of judicial and public policy."

This case provides some relief for attorneys and injured persons. It should force Medicare to at least respond to attorneys and plaintiffs in lien negotiation. The consensus to present has been that Medicare simply refuses to participate all the while leaving the possibility of outstanding liens and enormous penalties hanging over both the injured person and the attorney.

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