

ALERTS AND UPDATES

Class Action Lawsuit Challenges Medicare's Recovery Practices Under the Medicare Secondary Payer Statute

September 21, 2010

Under the Medicare Secondary Payer Statute ("MSP Statute"), Medicare has the right to be reimbursed for "conditional" payments for medical care after a Medicare beneficiary receives compensation from a third party that is the "primary" to Medicare. Recently, two Medicare beneficiaries filed a class action lawsuit, seeking a declaratory judgment against the Secretary of the U.S. Department of Health and Human Services to bar Medicare from engaging in certain practices when trying to recover conditional payments.

Medicare Recovery Practices Challenged

In *Haro v. Sebelius*,¹ a putative class action filed in the U.S. District Court for Arizona, the plaintiffs are challenging three alleged Medicare practices: Medicare's practice of sending demand letters for reimbursement of medical care unrelated to the injuries giving rise to the lawsuit or insurance claim; Medicare's requirement that beneficiaries pay the demanded amount within 60 days, even when they have filed an appeal challenging Medicare's determination; and alleged threats contained in Medicare's demand letter. The plaintiffs contend that Medicare's demand letter includes threats to obtain reimbursement from the beneficiaries' Social Security or Railroad Retirement checks, or that Medicare will refer the matter to the IRS or file a lawsuit against a beneficiary who does not pay the full demand within 60 days.

The plaintiffs' are also challenging Medicare's requirement that attorneys representing Medicare beneficiaries must withhold funds from settlements or judgments until Medicare is fully reimbursed under the MSP Statute, maintaining that this provision creates a conflict between the attorney and his or her client and "harms their attorney-client relationship."

In their two-count amended complaint, the plaintiffs contend that both of these practices exceed Medicare's authority under the MSP Statute and also violate the Due-Process Clause of the U.S. Constitution. The plaintiffs are seeking a declaratory judgment finding that these procedures are improper, and request that the court enter a permanent injunction barring Medicare from engaging in these practices in the future.

Court Denied Government's Motion to Dismiss

In November 2009, the district judge assigned to this case denied Medicare's motion to dismiss, finding that the plaintiffs had the standing necessary to bring the suit and that the amended complaint contained allegations necessary to withstand a motion to dismiss.² The plaintiffs have moved for class certification, which has been opposed by Medicare and the U.S. Department of Justice. The district judge overseeing the case has requested that the parties submit a joint pretrial order by December 15, 2010.

Conclusion

This case may have a significant effect on Medicare's recovery practices and the ability of beneficiaries to challenge repayment demands. This lawsuit also provides insight into Medicare's recovery practices under the MSP Statute.

Defendants, insurers and attorneys involved in personal-injury litigation with Medicare beneficiaries may want to follow developments in this case, especially if the district court grants the plaintiffs' motion for class certification.

For Further Information

If you have any questions about this *Alert* or would like more information about recent developments affecting the Medicare Secondary Payer program or the MMSEA reporting requirements, please contact [Sharon L. Caffrey](#); [Kenneth M. Argentieri](#); [Christopher L. Crosswhite](#); [Philip R. Matthews](#); any of our [Products Liability and Toxic Torts attorneys](#), our [Insurance and Reinsurance attorneys](#), or our [Healthcare attorneys](#); or the attorney in the firm with whom you are regularly in contact.

Note

1. *Haro, et al., v. Sebelius, Secretary of U.S. Department of Health and Human Services*, No. 09-CV-134 (D. Ariz. filed March 10, 2009).
2. *Haro v. Sebelius*, 2009 U.S. Dist. LEXIS 111053 (D. Ariz. Nov. 23, 2009).