



Medicare Liens and New Reporting Act

April 14, 2009 Issue by: Ray Coates

Medicare liens have always been a problem. They are about to become an even bigger problem. With an estimated 52 million people covered by Medicare, and the number expected to rise, Medicare will become an ever-increasing presence in personal injury litigation. The problem is how to deal with Medicare liens.

Nature of the Problem

Under the Medicare Act, Congress has attempted to make Medicare a secondary payor with rights against those who are designated as primary payors. While health insurance plans are the likely target, since 2003 the statute's reimbursement provisions have expressly applied to those who receive a settlement or award. Under the law, those who receive settlements or awards must reimburse Medicare within sixty days from receipt of the payment. However, Medicare is also given the rights to pursue anyone who has made payment to the beneficiary. Medicare's rights accrue upon payment. Medicare's time to pursue such claims is six years after the right accrues, or three years from the date the item or service was furnished or one year after notification there is a primary payor. These confusing dates obviously give rise to problems. Not only that, if Medicare sues, they can recover interest on the amount of reimbursement, as well as damages double the amount of Medicare's conditional payment.

New Reporting Act

Starting July 1, 2009, new rules require all insurers to determine whether a claimant is entitled to Medicare benefits and to notify Medicare when a settlement, award or judgment is paid to that beneficiary. Failure to do so can result in a penalty of \$1,000 per day. This obviously raises issues as to what defendants and their insurers should do when it appears the claimant is a Medicare beneficiary.

Recommended Steps

When one is involved with a suspected Medicare beneficiary, steps should be taken to confirm that fact through discovery. If the claimant's attorney has not notified Medicare of the claim, defense counsel should do



so. Medicare is often slow to respond to requests for information as to the amount of their lien, and is often unwilling to compromise their lien. This obviously inhibits cases from being quickly and efficiently settled.

Given the fact that the defendant, its insurer, and the attorney may be liable for the payment of reimbursement to Medicare, it is unsatisfactory to try to remedy the problem by way of a hold harmless clause in a release agreement. By the time Medicare gets around to pursuing their claim, the beneficiary may have spent all the funds and their attorney may be retired, or dead.

One solution is to list Medicare as a payee on a settlement draft. However, it is unlikely that claimants and their attorneys will want to do that, due to the slowness of Medicare in settling these claims.

Another solution is to set aside part of the settlement to reimburse Medicare once it has determined the amount it will accept. This allows the rest of the funds to be released, but does have the down side of tying up some of the settlement funds while the parties wait for Medicare to agree to a settlement.

Perhaps the new notification rules will encourage insurers to notify Medicare early on of the claim so that efforts can be made to determine the amount of the lien, which can then be satisfied at the conclusion of the case. These rules have been imposed by Congress as their attempt to try to reduce the costs of Medicare to the taxpayers. Medicare can be expected to try to use some of the new weapons in its arsenal so that they can pursue recovery. Insurers, and their attorneys, would be well advised to pay attention to these new rules to make sure penalties are avoided. The provisions are set forth at 42 U.S.C. §1395(y) and the regulations applying to such act, found at 42 C.F.R. §411.20 et seq.

If you have further questions concerning these provisions, please feel free to contact us.

This content is provided for informational purposes only. The content is not intended and should not be construed as legal advice.