



Plaintiff's Attorney Held Personally Responsible for Client's Failure to Reimburse Medicare Conditional Payment

By James E. Logan, CSSC

A recent decision supports the message we have been communicating to our clientele and others for a very long time. *The Logan Letter* has cautioned all parties to settlements involving Medicare beneficiaries to be certain Medicare's interests are protected through the settlement. Since December 1980 the Medicare Secondary Payor statute (MSP) has required Liability, Workers' Compensation and No-fault settlements to take into account Medicare's statutory interests and reimburse conditional payments made by Medicare for accident-related treatment and services. This requirement has not been well enforced until recently. Since the early part of this decade, the primary focus for reimbursement of conditional payments has been on Workers' Compensation claims and settlements. In addition to reimbursing conditional payments, workers' compensation insurers and self-insureds have been required to set aside a portion of the settlement for future medical expenses that would otherwise be payable by Medicare. Liability settlements, at the present time, are limited to protecting Medicare by reimbursing conditional payments following execution of the settlement. **Failure to protect Medicare's interests can cause individual parties to the settlement to become personally liable to Medicare, as happened in the matter of United States of America v. Paul J. Harris (United States District Court, Northern District of West Virginia, Civil Action No. 5:08CV102, November 13, 2008). This decision impacts virtually all parties, including the attorneys, to every liability, workers' compensation and no-fault settlement made with a Medicare beneficiary.**

Background

On May 22, 2002, Plaintiff James Ritchea sustained injuries when he fell from a ladder. Plaintiff was Medicare eligible during his treatment period and Medicare paid approximately \$22,500 for treatment and services received by plaintiff. Plaintiff and his wife retained attorney Paul J. Harris and sued the retailer who sold plaintiff the ladder. In July 2005, the matter was settled for a total of \$25,000.

Subsequent to the settlement, Mr. Harris sent the settlement details to Medicare, as well as information concerning his attorney fees and costs. Medicare subsequently calculated their statutory claim (not a lien) and reduced the reimbursement amount owed to \$10,253.59. (NOTE: We estimate that if fees and costs combined equaled 40 percent, after reimbursement of the compromised conditional payments, plaintiff would have netted less than \$5,000 from his settlement).

The compromised amount owed to Medicare was not paid within the statutorily-required period of 60 days; therefore, The Centers for Medicare and Medicaid Services (CMS) claimed they were entitled to their share of the settlement plus interest and that they would not pay for Medicare's full share of attorney's fees and costs. CMS adjusted Medicare's claim to \$11,367.78. It is worth mentioning that CMS could have sought double damages as allowed under the Medicare Secondary Payor Statute (MSP).

Motion to Dismiss

Defendant Harris filed a motion to dismiss arguing a lawyer cannot be held personally liable under 42 U.S.C. 1395y (b)(2) when settlement funds are distributed with the full knowledge and consent of the government. Because he forwarded the details of the settlement to the government, his argument is that the settlement funds were distributed with the government's knowledge and consent and he cannot be held individually liable to repay the debt.

Applicable Law

The Court disagreed with Mr. Harris. It emphasized that Section 1395y (b) (2) (B) (ii) of the Social Security Act (Medicare Secondary Payor Statute) states that when Medicare makes a conditional payment for medical services received as a result of an injury caused by another party, the government has a right of recovery for the conditional amount paid against any entity responsible for making the primary payment [emphasis added].

Repayment Required: A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the secretary under this title...with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured or by other means. 42 U.S.C. 1395y (b) (2) (B) (ii). **See also Cox v. Shalala**, 112 F.3rd 151, 154 (4th Cir. 1997)

To recover payment, the government may "bring an action against any or all entities that are required or responsible. . . to make payment with respect to the same item or service. . . under the primary plan." 42 U.S.C. 1395y (b) (2) (B) (iii).

Alternatively, the government "may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity." [Emphasis added]

The Court held that federal regulations implementing the MSP provide the entities from which the government may recover primary payments:

Recovery from parties that receive primary payments: CMS has the right of action to recover its payments from any entity, including a beneficiary provider,

supplier, physician, attorney, State agency or private insurer that has received a primary payment. 42 C.F.R. § 411.24 (g) [Emphasis added].

The Court's Conclusion

The Court concluded that Mr. Ritchea and his attorney, the defendant, received a \$25,000 settlement from the ladder retailer. Because the ladder retailer took responsibility for the payment of Mr. Ritchea's medical services, demonstrated by "a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there was a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured," the government can now seek reimbursement for the medical services paid by Medicare. [42 U.S.C. 1395y (b) (2) (B) (iii)]

The Court went on to say, "Furthermore, because the government can recover such payments "from any entity that has received payment from a primary plan, including an attorney, the defendant's argument that he cannot be held individually liable to reimburse the government under 42 U.S.C. 1395y (b) (2) is without merit. [42 U.S.C. 1395y (b) (2) (B) (iii), 42 C.F.R § 411.24 (g)] Accordingly, the defendant's motion to dismiss must be denied."

Lesson Learned

The Medicare Secondary Payor Statute (MSP) became law in December 1980. It was not well enforced until the early part of this decade. Even then, as CMS was developing enforcement methods, they focused their initial attention on Workers' Compensation settlements. That has changed in the past year and is expanding. On December 29, 2007, President Bush signed into law the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). This Act is an extension of the MSP. The immediate effect of the Act is to emphasize the need for entities that enter into liability, no-fault, and workers' compensation settlements with Medicare beneficiaries to protect Medicare's interests. If a settlement is being made with a Medicare beneficiary and conditional payments have been made, *all parties to the settlement, including the attorneys*, must protect Medicare's interests and arrange for reimbursement of the conditional payments to CMS. Failure to do so can expose one or more of the settling parties to a personal liability and the potential for a claim of double damages by Medicare. CMS is not required to place any of the settling parties on notice of their interests in any settlement. Rather, the statute requires the settling parties to determine if Medicare has any interest in a settlement being made with a Medicare beneficiary and if so, the extent of that interest. Simply stated, the MSP and MMSEA require that Medicare's interests always be considered and protected. Failure to do so can result in serious and expensive consequences to plaintiffs, defendants, law firms and individual parties to the settlement, including the lawyers representing the parties.

As this is written, CMS is in the process of promulgating additional rules concerning compliance with MMSEA. They have already established that insurers and self-insured entities (aka Responsible Reporting Entities or RRE's) must register with CMS via their secured website between the dates of May 1, 2009 and June 30, 2009. This is a mandatory requirement. On and after July 1, 2009, RRE's will be required to report applicable claims and settlements to CMS via their secure website on a quarterly basis. Failure to follow the requirements of MMSEA may result in \$1,000 per day penalties for each individual violation.

This is a complicated and very detailed topic in its own right and cannot be covered here. To obtain more information, visit our website at www.jeloganltd.com, and click Resources. There you will find two executive summaries and an article published by the American Bar Association discussing the MSP and MMSEA requirements. Keep in mind that between now and July 1, 2009 additional compliance rules will be published by CMS.

As a final word of caution, if you are a RRE, that is to say a self-insured entity or an insurer, your company should be well underway in developing internal methods for compliance with both the registration and reporting requirements of the MMSEA. Failure to properly comply with all CMS requirements may result in financial penalties.

In summary, all parties to a settlement must:

- Determine if any claimant/plaintiff is or will soon become a Medicare beneficiary. If so, that information should be shared with all parties to the settlement.
- If the claimant/plaintiff is a Medicare beneficiary, it is necessary to determine if Medicare made any conditional payments. If so, it is necessary to determine the amount of the conditional payments made.
- If conditional payments were made, it is advisable to determine the amount Medicare is seeking in reimbursement before negotiations begin. That amount will generally be the gross amount of the conditional payments made less the proportional cost of attorney fees and legal expenses. Other formulas may apply depending on the projected settlement value. Remember, Medicare has a statutory claim, not a lien, and their claim is enabled by federal statute and supercedes all state laws. Indemnity and hold harmless terms inserted into settlement agreements do not protect any of the parties from the obligation to protect Medicare's interests.

Stay Tuned...

The Harris decision focuses entirely on the requirement for reimbursement of conditional payments made by Medicare. There is one more shoe we are waiting to hear drop that has to do with protecting Medicare from overpaying future medical expenses when they should be secondary to any workers' compensation, no-fault or liability settlement. CMS is in the process of promulgating rules for compliance with the Medicare, Medicaid, SCHIP Extension Act of 2007 (MMSEA) as well as the Medicare Secondary Payor statute (MSP). If CMS follows processes similar to those they require today with workers' compensation settlements, after July 1, 2009, liability and No-fault settlements will also have to include some sort of provision to set aside a portion of the settlement for payment of future medical expenses Medicare would otherwise have to pay. More specific information will be coming in the near future as CMS publishes their MMSEA compliance guidelines.

For additional information or assistance, please contact Jim Logan at 248-865-3900. James E. Logan & Associates, Ltd. specializes in settlement consulting and offers educational and training programs to clientele and industry groups, as well, as to law firms across the country. Consulting services are also available to assist clientele to comply with the MSP and MMSEA requirements.