

## Medicare Laws Continue to Roadblock Settlements

Recent amendments to the Medicare Secondary Payers Act (MSPA), has caused aggravation to parties attempting to settle claims due to the uncertainty of future Medicare liabilities. The uncertainty has caused frustration to the plaintiffs and defense bar alike, as well as to insurers. The MSPA's current protocol prevents parties from moving forward with settlement in a timely fashion, as they are unable to determine the reimbursement amount owed to Medicare. As a result, much time and effort of these parties has been wasted due to the roadblocks presented by the Medicare, Medicaid, and SCHIP Extension Act ("MMSEA"). In response, parties have attempted to use the courts to circumvent the newest MSPA rules; however, few have found success. Because of the ill-received changes, federal lawmakers have crafted proposed procedures and requirements they hope will streamline routine settlements that otherwise fall victim to the current MSPA rules.

Per the current rules of the MSPA, Medicare holds a right to reimbursement for treatment subsidized through its funds. The MSPA gives the Center for Medicare and Medicaid Services ("CMS") subrogation and intervention authority to look out for its best interests. The key problem in relation to settling claims is that the obligation to

repay CMS does not arise until after a judgment, settlement or payment from an insurer. Furthermore, it is not until the judgment, settlement or payment that the parties can request a demand for reimbursement from CMS. Parties can expect to wait at least 6 months until they receive the final notice of reimbursement. As a result, parties are left speculating as to the amount of the lien owed to CMS.

Further complicating a party's desire to settle, once CMS begins the process of determining the amount owed, they do not take into account discounted settlements resulting from questionable liability claims or "cost of defense" settlements. Because of these roadblocks to settlement, parties have taken creative steps to protect their interests.

In Hensley v. Marion, 2011 WL 570252 (W.D.Va.), Hensley brought a personal injury action against Marion stemming from a motor vehicle accident. Marion was insured with Erie Insurance Exchange. Upon settlement of \$45,000.00, Hensley demanded prompt payment from Erie. Erie claimed that settlement negotiations included an agreement to withhold settlement payment until after all liens, including a Medicare lien, are determined. In Hensley's situation, Erie was waiting for CMS's final notice of the amount of reimbursement.

Two months after settlement, Hensley's attorney filed a motion to enforce the settlement and his client offered to indemnify Erie for any CMS lien later claimed. In response, Marion removed the matter to the Western District of Virginia and Erie sought to intervene. Marion contended that the state court's

enforcement of the settlement would leave the parties open to liability to CMS, if payment is made before receipt of the final notice of reimbursement. Accordingly, MSP and MMSEA regulations preempt Hensley's motion to enforce the settlement agreement.

Judge Samuel Wilson rejected Marion's argument, concluding that this dispute is nothing more than a breach of contract issue. As such, the issues regarding settlement are to be interpreted through "... Virginia contract law and not on any federal statutes or regulations governing Medicare payments." Because of the remand, Hensley's attorney asked for sanctions against Marion's attorney for the improper removal, however his sanctions motion was ultimately denied.

Parties elsewhere have also attempted to utilize the courts in an effort to circumvent the federal regulations, without much success. In an effort to speed up the process of learning the CMS final disbursement amount, a Kentucky defendant asked a federal court to issue a declaratory judgment regarding the amount owed to CMS. In Portman v. Goodson, et al., 2011 WL 773427, Goodson and his employer filed a third-party complaint against the Secretary of the U.S. Department of Health and Human Services asking the court to rule on the aforementioned declaratory judgment. The defendants claimed that they had exposure to liability for reimbursement to CMS and that any potential liability for reimbursement should be determined prior to settlement or verdict. The court concluded that it did not



have jurisdiction as CMS's right to repayment does not become ripe until after a verdict, settlement or payment by an insurer. Thus, the complaint failed to allege a "case or controversy" recognized under federal declaratory judgment statutes.

Help may be on the way as federal lawmakers consider a revamping of the CMS reimbursement process. Under proposed legislation, H.R. 1063, The Strengthening Medicare and Repaying Taxpayers Act (SMART Act), CMS would be required to provide reimbursement amounts upon request. Once in place, the SMART Act's regulations and procedures will no longer prevent parties, fearing future liability, from settling claims involving Medicare. Beginning at 120 days before reasonable expected settlement or judgment a

party will be able to request CMS provide a statement of reimbursement. CMS will be required to provide a reimbursement statement within 65 days of the request. The proposed legislation adds some teeth to the statutes as CMS's failure to respond to requests could result in waiver of reimbursement. The drafters of the Bill hope the SMART Act will simplify the reimbursement process to allow all parties involved to make decisions regarding settlement based on the merits of the claim rather than federal administrative requirements.

While the proposed changes under the SMART Act certainly do not solve all problems regarding the Act, it will certainly be a sound stepping off point. Unfortunately, the proposed legislation does not address anything in regards to Medicare Set Asides in liability cases,

another obvious roadblock in settlements. KPM will continue to monitor the practical effect of the Medicare laws and will continue to provide clarity to our clients when faced with questions on this subject.



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