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— Mark Bernstein,
The Bernstein
Law Firm

On the hook

Medicare rules will press insurers on liens against PI settlements

By Carol Lundberg

Starting in July, plaintiff attorneys in personal-injury cases won't be the only ones on the hook to make sure Medicare is reimbursed for treatment of eligible injured clients.

After July 1, attorneys representing liability-insurance providers will have to ensure that Centers for Medicare and Medicaid Services, or CMS, is informed of possible liens on liability settlements.

If attorneys fail to do so, and Medicare isn't compensated, the insurer clients could face a \$1,000-per-day fine.

By law, CMS must be notified when a personal-injury claimant is covered by Medicare. To ensure that it recovers its share of what it paid to treat the injury, Medicare is entitled to put a lien on the claimant's settlement.

The prospect of a fine may cause some defendant-insurer lawyers to go overboard to protect themselves and their clients, said Donna M. MacKenzie, attorney at Berkley-based Olsman, Mueller, Wallace & MacKenzie, which represents plaintiffs in personal-injury cases. Most of the firm's clients are eligible for Medicare, she added.

MacKenzie said she worries that overreaction to the new rule could slow the process of compensation for her clients.

"The lawyers who represent these insurers don't want (their clients) to get fined," she said. But she doesn't want anyone to panic.

"Their responsibility begins and ends with notifying Medicare. That's all they have to do," she said. "They don't have to worry about whether Medicare gets paid. They won't really be able to talk to Medicare because of HIPAA laws. They just have to put Medicare on notice when a claimant is Medicare eligible."

The purpose of the change is to ensure that all parties comply with the Medicare Secondary Payer statute.

She has heard rumblings that some defendant attorneys are saying they'll pay Medicare directly.

"There are some who think that's necessary, and are suggesting that they'll make the check out to my firm, to my client, and to Medicare," she said. "That's not going to work. Even if we could figure out whom to send the check to for en-

dorsement, it still has to come back to us for endorsement. Medicare is already four months behind on final demand letters.

"Sometimes we can't even get someone from Medicare on the phone. How in the world would we manage sending checks out there? It's never going to happen."

Though most plaintiff attorneys already were notifying Medicare, and were ensuring that their clients paid Medicare to satisfy liens against their settlements, some were not, said personal injury attorney Mark J. Bernstein of The Bernstein Law Firm in Farmington Hills.

"The big picture is that Medicare is sick of being screwed," he said. "They've tried to say if there is any other type of insurance, Medicare should be the secondary insurance. And that's the law, and most everyone follows it. The problems are that when there are multiple insurers, everyone starts paying the bills, and it can take years to sort it out. It's a nightmare to untangle that mess."

He said that it appears CMS is trying to avoid the mess by getting lawyers on both sides of a case to figure out early what liens will need to be paid. But he's not hopeful that adding more rules about Medicare will be helpful.

"Handling liens is nothing new, but navigating them has become more complex every year. It holds up disbursement and frustrates the clients who are just trying to pay the rent," Bernstein said. "We'll wait and see if this helps, but if the past is any indication of the future, it will only make it more complicated."

He said he worries that because insurance liens are complex and often misunderstood, the law fails to take into account how slow the process of sorting out primary and secondary insurance payers is.

It's difficult enough now, Bernstein said.

"The law requires Medicare to be reimbursed 60 days after a settlement," he said. "But it can take months for Medicare to get a final recovery demand letters to us. That slows the process."

Even worse is when his clients don't want to tell him that they're Medicare eligible.

"Medicare is such a nightmare," he said, "some clients try to avoid it altogether and don't tell you."

The new Medicare notification procedure re-

quirement will come up most often in cases in which there is an injury involving an elderly person, and the injured person is Medicare eligible, said Jules B. Olsman of Olsman Mueller.

"There are some cases that are pretty clear. If you have a slip and fall that causes a hip fracture, that case is pretty clear and everyone knows how much the medical bills are and how they got paid and who is entitled to compensation and repayment," Olsman said.

It gets stickier though, when a client has multiple health issues.

"Let's say a person enters a nursing care facility with congestive heart failure, and that patient is being treated for that. But then, while in the hospital that patient falls or is dropped and fractures a hip," he said.

"The case is only about the hip fracture, but when Medicare sends the final demand letter, everything they paid is going to be in there. We have to sort out what they're entitled to as a result of the injury, but not the other treatment," Olsman said.

The set-aside amount and payment will remain the responsibility of the plaintiff's attorney, he said, as it has been. A federal court late last year found that Paul J. Harris, a West Virginia attorney, was responsible to ensure that CMS was compensated after Harris' client fell from a ladder and sued the ladder retailer.

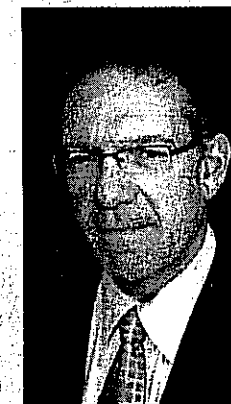
The client was awarded \$25,000. Harris had notified CMS that his client was Medicare eligible, but did not pay CMS the \$11,367 Medicare claimed it was owed, Olsman said.

"The client didn't have the money anymore, and the court said Harris should have paid on behalf of the client," Olsman said.

The CMS change will require defendant attorneys to become involved with communicating with Medicare early in the process, he said.

"One way to look at this is the government wants to make sure they're not being ignored and they're getting the last dollar," he said. "If you threaten the insurance industry with penalties, the government will get compliance."

If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@mi.lawyersweekly.com.



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