

Medicare

Don't Tangle with the 800-Pound Gorilla

Author: R. Scott Krause, JD, Eccleston and Wolf

Almost every lawyer has a particular area of the law he or she would prefer to avoid. For many attorneys, Medicare issues are one such area. It's not difficult to see why; Medicare regulations are exceptionally convoluted. The program's complexity and delays in new regulatory implementation make even pundit interpretation, never mind agreement, difficult. Defense attorneys may have ignored Medicare compliance concerns in the past, treating those like any other medical lien—with satisfaction of Medicare's interests from settlement proceeds being viewed as the responsibility of plaintiffs' attorneys.

Attorneys ignore Medicare provisions at their own peril, however. Though our government long has been able to seek reimbursement for Medicare benefits, new legislation has extended those rights. Since passage and implementation of "Section 111" of the Medicare, Medicaid, and SCHIP Extension Act of 2007, Medicare has taken steps to increase its reimbursement rate. It now actively exercises its right to obtain payment from attorneys and primary payers (such as insurance carriers) who disburse or pay settlement proceeds without protecting Medicare's interests.

As a result of Section 111, primary payers have the affirmative responsibility of aiding the recoupment of Medicare payments. Insurance companies and self-insured entities are easy "deep-pocket" targets. Rather than chasing down a plaintiff who received (and may have spent) settlement monies, Medicare can look instead to a primary payer for payment. A settling insurance company can be held responsible for Medicare reimbursement even after making payment in settlement to a plaintiff Medicare beneficiary. Furthermore, if the government files suit to collect, it is entitled to double damages, plus interest. Insurance carriers also are responsible for reporting payments to Medicare beneficiaries and/or their counsel. Noncompliance can result in penalties of up to \$1,000 per day, commencing on the payment date.



A settling insurance company can be held responsible for Medicare reimbursement even after making payment in settlement to a plaintiff Medicare beneficiary. Furthermore, if the government files suit to collect, it is entitled to double damages, plus interest.

(continued on page 2)

Medicare

Don't Tangle with the 800-Pound Gorilla



...exposing a client to a Medicare claim that has not been reimbursed after a settlement is paid can irrevocably damage that relationship.

This provision specifically concerns attorney-client relationships. Clients, including carriers, are the lifeblood of every attorney's practice. As such, exposing a client to a Medicare claim that has not been reimbursed after a settlement is paid can irrevocably damage that relationship. The following hypothetical situation, which starts with a voicemail message from an insurance claims adjuster to retained defense counsel, demonstrates this point.

ADJUSTER *Hey Jim, it's Patty from ABC Insurance. I just received notice from Medicare regarding a purported unpaid lien in the Hillman matter that we settled two years ago. I am sure it is an issue we can easily clear up, but Medicare asserts we are responsible for payment of the lien, plus penalties and interest in the amount of nearly \$50,000, and that it will seek a double recovery if it has to initiate suit. Please call me.*

JIM *(Ruminating on the voicemail.) My good friend Allison was my adversary in Hillman. I know she would have taken care of any liens, especially with Medicare, and I am sure I sent her the settlement check with my customary letter that settlement funds should not be disbursed until all liens are satisfied. I also expect that our standard release contained a lien provision to protect the carrier and my firm from any responsibility. I'll give her a call and check in.*

ALLISON *(Responding to call after exchanging pleasantries.) I also received a notice from Medicare in Hillman. When I received the settlement funds, my relationship with Mr. Hillman blew up, and he refused to let me pay any of the liens. He was adamant and quite rude. Rather than fight with him, I deducted my fee and the costs and disbursed the balance of the settlement monies to him. Mr. Hillman promised to negotiate and satisfy the liens on his own, which I confirmed in writing. We're OK, right?*

JIM *I hope so. I'll have to review and get back to you.*

A subsequent review of regulations revealed that both Allison and ABC Insurance have exposure to Medicare. Certain interpretations of regulations might also confer liability to Jim, because he served as a conduit for the settlement. No lawyer in Jim's shoes wants to inform his client that mistakes were made carrying out the settlement—and that they're on the hook for payment.

In this context, *U.S. v. Harris*, 2009 WL 891931 (N.D. W.Va), *aff'd*, 334 Fed. Appx. 569 (4th Cir. 2009) bears reference. In *Harris*, the plaintiff failed to pay the Medicare lien following the settlement of a personal injury claim. The government sued *Harris* to recover the unpaid amount, plus interest. When *Harris* appealed, the District Court denied the Motion to Dismiss, citing the Centers for Medicare & Medicaid Services' right to recover from an attorney who received a primary payment.

How can attorneys protect themselves—and their clients—from the risk of government exposure to pay unreimbursed Medicare benefits, plus statutory damages and interest?

Medicare Practice Pointers

Follow the practice pointers below to help reduce risk, eliminate uncertainties, and decrease unnecessary expenses:

- (1) **At the outset of the claim, notify the plaintiff's counsel in writing of the duty to protect Medicare's interests.** This practice enhances the likelihood that Medicare issues will be identified and addressed at an early stage of the claim.
- (2) **Open a dialogue with the opposing attorney, and determine whether the plaintiff is a Medicare recipient.** If so, report the claim to Medicare and determine the amount of any asserted lien(s). Attorneys for both the plaintiff and the defendant benefit by analyzing all potential Medicare liabilities. Failing to make these determinations early on risks accidental omissions, delays in claims resolutions, and monetary pitfalls.
- (3) **Obtain information for Medicare beneficiary verification** from the plaintiff's counsel or through written discovery or deposition (e.g., by using a CMS Query Form or a standard Medicare Interrogatory).
- (4) **Ensure the plaintiff's counsel obtains a conditional payment letter and, after any negotiations, a final Medicare lien amount** with the regional Medicare Secondary Payer Recovery Contractor (MSPRC). This step helps eliminate liability ambiguities and gives the plaintiff's counsel the opportunity to negotiate with Medicare before settlement discussions.
- (5) **Understand the amount of any Medicare lien prior to engaging in settlement discussions or mediation.** A primary focus of settlement analysis and discussions in personal injury claims is the amount a plaintiff will net from a proposed settlement. This analysis cannot be undertaken effectively without knowing in advance Medicare's position on reimbursement. All too often settlement discussions stall because the amount of Medicare's interest has not been confirmed.
- (6) **Be precise in discussing the particulars of ensuring payment to Medicare when settling a case.** Treat Medicare as an essential term of settlement similar to joint tortfeasor, indemnity, and/or confidentiality clauses, which are often required as terms of a settlement agreement. Unforeseen problems with Medicare can result in significant settlement disputes or delays.
- (7) **Select an appropriate Medicare release provision.** As a response to Section 111, many carriers developed model Medicare release provisions for inclusion in retained defense counsel documents. Some of these provisions may be viewed as non-negotiable components of a release. Defense counsel does well to review any carrier's proposed Medicare clause to ensure it: adequately protects the client and carrier; meets the circumstances of the case; and complies with applicable law and rules of professional conduct. Some proposed release clauses contain language requiring plaintiff's attorneys to indemnify the settling defendant and its carrier if Medicare interests are not fully satisfied. Some jurisdictions have also held that it is unethical for defense attorneys to request the plaintiff attorney to indemnify the defendant and/or carrier because of the conflict of interest that arises between the plaintiff attorney and his client. This ethical issue is present on both sides of the bar, potentially effecting plaintiff attorneys and defense attorneys equally.
- (8) **Ensure the plaintiff understands no settlement proceeds will be paid until the final Medicare lien is determined and a payment method is agreed upon.** Failing to address these logistics increases the likelihood of post-settlement disputes, the filing of motions to enforce settlements, or the dissolution of settlements. Detailing these specifics in advance also reduces the incursion of additional legal expenses. Carriers and clients alike frown upon wasting time and money due to counsel's failure to adequately address Medicare issues in advance.

While it's nigh impossible to eliminate all risks in your practice, following the above steps can help insulate attorneys and carriers from potential Medicare exposure. Don't make Medicare the 800-pound gorilla in the room—educate yourself and your associates to protect your reputation, avoid lost settlements, and mitigate unhappy clients.

Author Information

R. SCOTT KRAUSE began his career at Eccleston and Wolf in 1998, following four years of practice in a small, general practice firm environment. During his tenure with the firm and in his role as a supervising attorney, Scott has handled litigation matters in a variety of practice areas including, but not limited to, the defense of health care professionals, legal malpractice defense, the defense of employment claims, products liability defense and the defense of general casualty and premises liability matters. In addition to his litigation experience, Scott has regularly represented a variety of professionals in the defense of board licensing actions before professional boards in Maryland and Washington, D.C. Scott has been named one of *The Best Lawyers in America* in the area of legal malpractice defense and a *Maryland Super Lawyer* in the area of personal injury/medical malpractice, and has been recognized as one of *Baltimore and Washington DC's Top Attorneys*.

In addition to his professional activities as a litigator, since 2002, Scott has been an adjunct faculty member at the Anne Arundel Community College teaching Civil Procedure and Business Law to aspiring lawyers and paralegal students.



**ProAssurance Casualty Company
ProAssurance Indemnity Company, Inc.**

**2600 Professionals Drive
P.O. Box 150
Okemos, Michigan 48805-0150**

**TELEPHONE: 800.292.1036
FAX: 517.349.8978**

PRSRT STD
US POSTAGE
PAID
PROASSURANCE
48924

The *Lawyers' Professional Liability Update* newsletter is published two times per year for the benefit of ProAssurance insureds. Suggested topics for future issues and address updates should be directed to Connie DeMarco at the number listed above.

Find risk management articles and information archived on our website at www.proassurance.com/lawycare/newsletter.aspx

Printed on recycled paper. Copyright © 2014 ProAssurance Corporation

DISCLAIMER: Articles in this publication are neither official statements of position nor should they be considered as professional legal advice to individuals or organizations.



LawyerCare[®]



NEW Dedicated Claims Reporting Numbers and Email

To better serve your clients, we've established new toll-free numbers and an email address dedicated exclusively to LawyerCare claims reporting:

PHONE: 855.214.1295

FAX: 877.799.0462

EMAIL: lawycareclaimsintake@proassurance.com

Please encourage your clients to use these dedicated points of contact to report claims. As a reminder, your clients should report claims directly to ProAssurance's LawyerCare team. If a client contacts you regarding a claim, please provide them with the toll-free number above and ask them to call us directly.