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Handle Your Medicare Liens The 'SMART' Way

Liens. No attorney likes dealing with them, but they are a seemingly omnipresent reality of litigation. In personal injury and workers' compensation cases that involve a Medicare beneficiary, the parties should always protect Medicare's interest, in accordance with the Medicare Secondary Payer Act ("MSP"), 42 U.S.C. § 1395(y)(b). In many cases, this will mean the satisfaction of a Medicare lien as part of a settlement, judgment, or award. However, satisfying the lien is often fraught with difficulties, and the debtor can often feel as though they are left trying to hit a moving target. One of the more common and avoidable situations (more on this below) that occurs is that the parties will settle a case in reliance on a Conditional Payment Statement obtained from the Centers for Medicare & Medicaid Services ("CMS"), but after settlement, the debtor will receive a higher lien demand from CMS when they attempt to satisfy the lien amount they previously obtained. One such unfortunate situation is currently being litigated in Pennsylvania federal courts right now.

A Cautionary Tale

In 2011, David Trostle, a Medicare beneficiary, had a prescription incorrectly filled and developed lithium toxicity, spending a total of 66 days in various treatment and recovery facilities. Trostle retained counsel and brought a personal injury claim against his pharmacy. The claim was reported to CMS, and through their agent, CMS asserted a lien against any recovery Trostle could secure through his lawsuit. A May 2014 letter from CMS' agent informed Trostle that the lien at that time was \$1,212.32. Trostle's claim reached settlement in July 2014 for \$225,000.00. Following settlement, Trostle's counsel notified CMS and offered to pay the lien amount of \$1,212.32. CMS responded in August 2014 with a lien demand of \$53,295.14.

Trostle's counsel administratively appealed the lien demand, arguing that Trostle had relied on the May 2014 letter in the settlement of his claim and that he had no obligation to reimburse CMS for the full lien demand. Trostle's lien appeal was denied on October 15, 2014, with CMS advising that the lien demand could again be appealed through their administrative process, so long as appeal was made within 180 days of the October 15, 2014, decision. While Trostle's counsel did file the administrative appeal, this was not done until June 10, 2015, after the 180-day timeline had elapsed. The appeal was denied, but instruction was provided to Trostle regarding additional appeal options, including appeal to an Administrative Law Judge.

However, no further appeal was sought, and following Trostle's death, his widow and his estate filed a Complaint in the United States District Court for the Middle District of Pennsylvania in 2016. The Complaint asserted theories of equitable estoppel, unjust enrichment, and that CMS had waived their right to increase their demand based on their prior communications.

Trostle's litigation was not successful, with the Court determining that Trostle did not have standing, as his claim arose under the MSP and he had not exhausted all administrative remedies and received a *final* decision from the Secretary of Health and Human Services, as required by the statute. *Trostle v. Ctrs. for Medicare & Medicaid Servs.*, 2016 U.S. Dist. LEXIS 143101. The Court found that while the decision to deny his appeal of the conditional payment amounts may have become *binding* when Trostle failed to follow the outlined administrative process and pursue additional administrative appeals, it did not constitute a *final* decision, such to grant him standing. The Court

dismissed Trostle's action with prejudice, noting that no amendment to his Complaint could infuse it with the requisite subject matter jurisdiction necessary for it to proceed. Trostle has subsequently filed an appeal to the United States Court of Appeals for the Third Circuit. A copy of Trostle's Appellant's Brief can be accessed by clicking [here](#).

On July 7, 2017, the plot thickened, as they say. Two days before their right to assert recovery action under the MSP would have elapsed, the United States filed an MSP recovery claim under 42 U.S.C. § 1395(y)(b)(2)(B) in the United States District Court for the Middle District of Pennsylvania. The suit named as defendants Trostle's widow, in her capacity as Administratrix of his estate; Trostle's counsel in the underlying negligence claim; and counsel's law practice. In their Complaint, the United States set forth facts consistent with those outlined above, with a few additional distinctions. Namely, the United States alleged that the conditional payments they had made in the underlying case actually totaled \$84,353.00 and that they had reduced their prior demand to \$53,295.00 to offset their share of attorney's fees associated with the prosecution of the underlying claim. However, given that payment of the lien was never made and that the United States had incurred additional litigation costs in their recovery efforts, their action now sought recovery for the full amount of the debt, \$84,353.00, as well as interest at a rate of 9.625% per year. A copy of the United States' Complaint can be accessed by clicking [here](#).

Defendants issued a joint Answer to the United States' Complaint on August 2, 2017, asserting affirmative defenses, including notifying the Court of their pending appeal before the United States Court of Appeals for the Third Circuit. A copy of the Defendants' Answer can be accessed by clicking [here](#).

Both Trostle's appeal before the Third Circuit and the United States' MSP claim are pending before their respective Courts as of the time of this writing.

How To Avoid Post-Settlement Medicare Lien Surprises

These cases can be distilled into one salient point, and that is that CMS continues to assess and review conditional payments through the date of settlement and will not issue a final demand until resolution of the underlying matter has occurred. The reason for this is simple: until a settlement, judgment, or award has occurred, a primary payer has not been established and Medicare will continue to conditionally pay benefits until such a primary payer is identified. Thus, Medicare will not make a *demand* for conditional payments in advance of this determination. Prior to settlement, judgment, or award, CMS will only provide the identified debtor with a lien amount that is current through a particular date, either noted on correspondence or listed on the Medicare Secondary Payer Recovery Portal ("MSRP").

As part of the Strengthening Medicare and Repaying Taxpayers Act of 2012 (the "SMART Act"), CMS redesigned the MSRP to allow the debtor (or their validly-appointed agent) to request a one-time Final Conditional Payment Amount. The amount provided by CMS' agent at this time will be binding, as long as the parties do settle the case within three calendar days of the request and evidence of the settlement is uploaded to the MSRP within 30 days of the request. If the case is not settled or the documents evidencing settlement are not uploaded to the MSRP, the Final Conditional Payment Amount will be voided. Because of this, parties should have knowledge of the conditional payments for which CMS is seeking recovery and have lodged all disputes for unrelated charges prior to requesting the Final Conditional Payment Amount.

Unfortunately, for Trostle and his counsel, this new MSRP option was not yet available when their case settled. However, this tool can be an effective means to help avoid any post-settlement lien demand surprises and potential liability. Counsel dealing with a Medicare lien should be aware of the robust recovery provisions of the MSP, which permits recovery from "any entity that has received payment from a primary plan or from the proceeds of primary plan's payment to any entity" and permits the United States to collect *double damages* in a recovery. 42 U.S.C. § 1395(y)(b)(b)(iii).

The Dickie, McCamey & Chilcote **Medicare Compliance Group** is available to help your organization with all aspects of MSP compliance. If you have any questions regarding the information outlined above or any other inquiries, please feel free to contact us.



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