

February 2011

## Medicare Compliance Case Law Update

The following is a summary of recent case law developments regarding Medicare recovery rights and Medicare compliance.

### I. Federal Court addresses protecting Medicare's interests with respect to setting aside future funds for medical expenses in liability cases.

*Big R Towing v. David Wayne Benoit, et al.*, 2011 U.S. Dist. LEXIS 1392, involved a plaintiff who was employed by Big R Towing as a tugboat captain working as a seaman and was covered as a seaman under The Jones Act. His treating physician had recommended surgery for his back and hip and the case was ultimately settled at a mediation for a lump sum of \$150,000.00. At the time of settlement, the plaintiff was receiving Social Security Disability benefits and, as part of consideration of the settlement, the plaintiff would be responsible for protecting Medicare's interests under the Medicare Secondary Payer Act, 42 U.S.C. § 1395(y)(b)(3)(A). An oral motion was made before the court to determine the future medical expenses incurred by the plaintiff related to this incident. Significantly, the court noted that Medicare does not currently have a policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability claim or the recovery of future medical expenses incurred in liability cases. Further, at the time of the settlement, the plaintiff had not attained the age of 65. However, the plaintiff was receiving Social Security Disability benefits. The court went on to note, in pertinent part, as follows:

1. The parties shall, and have, reasonably considered and protected Medicare's interests in the settlement of this matter.
2. Medicare is a secondary payer under the Medicare Secondary Payer program, to the extent there are Medicare covered expenses incurred...in the past **or in the future**, arising out of the accident or injuries alleged in this lawsuit.

The court also noted that the plaintiff would set aside monies for his future injury-related expenses out of the settlement proceeds.

This is the first case in which we have seen a federal court address the issue of future medical expenses in liability claims involving Medicare beneficiaries. The court made clear that

Medicare's interests should be protected with respect to not only past medical expenses that Medicare has paid, but also future medical expenses the plaintiff may incur.

### II. Pennsylvania Superior Court rules on the Medicare conditional lien recovery process.

In *Zaleppa v. Seiwel*, a Medicare plaintiff was injured in an automobile accident and following the trial in which a jury verdict was entered in the amount of \$15,000.00 against the defendants, post-trial motions were filed regarding Medicare recovery rights. Specifically, defendants requested that the court enter an order directing the defendant to pay the verdict either by naming Medicare along with plaintiff and her attorney as payees on the drafts satisfying the verdict or by paying the verdict into court pending notification from Medicare that all Medicare liens had been satisfied. The Pennsylvania Superior Court concluded that there was no legal basis under federal or Pennsylvania law to assert the interests of the United States government as to reimbursement of Medicare liens.

In so finding, the Superior Court went on to note that if an outstanding Medicare lien existed in the case, the Medicare Secondary Payer Act requires that either the plaintiff, as an entity that received payment from a primary plan, or the defendant and defendant's insurer, as a primary plan, must reimburse Medicare. However, the Superior Court stated that this statutory obligation to reimburse Medicare was distinct from Medicare's statutory right of reimbursement and nothing in the Medicare Secondary Payer Act expressly authorizes a primary plan to assert Medicare's right to reimbursement as a preemptive means of guarding against its own risk of liability. The court noted that the United States government and not a private entity may file a lawsuit in which the rights of the government are asserted. Further, private entities are prohibited from asserting the interests of the United States government in a post-trial motion or in any other phase of litigation. The Superior Court stated that defendants were required to satisfy the judgment in full and could not do so if Medicare was added as a payee on the draft. The court stated that adding Medicare as a payee would interfere with the rights of the plaintiff affirmed by the judgment.

Of note, there was no indication that the parties had investigated whether a conditional lien existed in the case. Moreover, there was no indication that any type of lien had

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been negotiated with Medicare at any point during the litigation or thereafter. The practical effect of the *Zaleppa* decision is that reimbursement of Medicare liens is not just a shifting of the burden from one party to the other and requires a formalized process to verify the amount of the lien and negotiate the lien with Medicare prior to the conclusion of a case.

### III. The 11<sup>th</sup> Circuit limits Medicare's conditional lien recovery rights.

In the case of *Bradley v. Sebelius*, 09-13765, 2010 WL 3769132 (11<sup>th</sup> Cir. Sept. 29, 2010), the 11<sup>th</sup> Circuit restricted Medicare's right to enlarge its recovery process based upon agency directives and manuals. *Bradley* involved a wrongful death action in which the decedent, a Medicare beneficiary, sustained alleged nursing home neglect and abuse. Prior to an action being filed, the parties settled the claim in the amount of \$52,500.00, the full amount of the nursing home's liability insurance policy limits. Plaintiff notified the government of the settlement proceeds as well as the associated legal fees and costs. The amount of the Medicare lien was \$38,875.08. Medicare refused to reduce its lien and requested payment of the same within 60 days. Counsel for the estate filed an application with the probate court to adjudicate the rights of the estate and the rights of the children in regard to the compromised sum received in settlement of their claims. The probate court thereafter determined that Medicare's recovery right was actually \$787.50 based upon the limited recovery made by the estate.

Medicare refused to accept the probate court's determination and, relying on language contained in the Medicare Secondary Payer Manual, Medicare asserted that it would not recognize the probate court's allocation of liability payments unless and until payment was based on a court order issued on the merits of the controversy. The district court, adopting the report and recommendations of the magistrate judge, held that the government's interpretation of the Medicare Secondary Payer Act and its attending regulations were reasonable and the court also relied heavily on the language contained in the Medicare Field Manual. Accordingly, the district court held that Medicare was entitled to reimbursement of its full conditional lien, less procurement costs. On appeal, the 11<sup>th</sup> Circuit Court of Appeals determined that the Field Manual was not entitled to deference under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2<sup>nd</sup> 694 (1984). The court determined that the deference given to the language in the Field Manual was misplaced and the government's position was unsupported by the statutory language of the Medicare Secondary Payer Act and its regulations. The court went on to note that accepting the government's position would have a chilling effect on settlement as it would compel the plaintiffs to force their tort claims to trial thus burdening the court system. Moreover, the court found compelling that the government had been asked to

participate in the proceedings on various occasions, but had declined to take part in the litigation process.

The *Bradley* case is significant in that it is one of the first cases that restricts Medicare's broad interpretation of its recovery rights.

### IV. Statute of Limitations Defense for Medicare Recovery Actions.

In the case of *United States v. Stricker, et al.*, the United States District Court for the Northern District of Alabama barred Medicare's recovery rights relying on defendants' statute of limitations defense. Specifically, the government filed suit against plaintiff's attorneys and insurers that were involved in a \$300 million toxic tort settlement reached in 2003. Defendants argued the government was barred from filing the suit on multiple grounds. The district court decided the case on the defendants' statute of limitations defense. The district court determined that the Medicare Secondary Payer Act did not include a deadline for filing a claim for recovery. As such, the Federal Claims Collection Act was utilized by the court in determining the appropriate statute of limitations period. The court held that the claim against corporate defendants, i.e., insurers, was based in tort and, as such, a three-year statute of limitations applied which resulted in a dismissal of the government's claims as they were not filed until 2009. With respect to the attorney defendants, the court determined that the government's claims against them were based on contract law as they arose from counsels' fee agreements. As such, the court determined that a six-year statute of limitations applied to those claims. The court determined that the statute of limitations period began to run at different times depending on the group. As to the corporate defendants, the cause of action arose at the execution of court approval of the settlement. However, with respect to the attorney defendants, the cause of action arose when payment of the settlement was made. Based upon the foregoing, both claims were barred by the court as untimely.

The government has filed a motion for reconsideration with the district court and we are awaiting the judge's ruling with respect to the same.

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If you have any questions or comments regarding this information, or would like to discuss the information further, please contact Charles G. Brown, Esq., at 412-392-5204 or via e-mail at [cbrown@dmclaw.com](mailto:cbrown@dmclaw.com); Bridget Langer Smith, Esq., at 412-392-5624 or via e-mail at [bsmith@dmclaw.com](mailto:bsmith@dmclaw.com); Katherine S. Gallagher, Esq., at 412-392-5413 or via e-mail at [kgallagher@dmclaw.com](mailto:kgallagher@dmclaw.com); or Jamie Mulholland, Medicare Compliance Coordinator, at 412-392-5351 or via e-mail at [jmulholland@dmclaw.com](mailto:jmulholland@dmclaw.com).