

Solving the MSP Dilemma: A Strategy for Health Care Providers to Avoid Exposure Under the Medicare Secondary Payer Statute

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The Medicare Secondary Payer (“MSP”) statute was originally enacted by Congress in 1980 to reduce federal health care costs. (42 U.S.C. § 1395y(b).) This cost saving is accomplished by making Medicare a secondary payer, with the primary payer being any third party insurance company or self-insured business subsequently found liable for a Medicare beneficiary’s medical costs. Under the MSP statute, if Medicare pays a beneficiary’s medical bills, those payments are deemed conditional

and the Centers for Medicare & Medicaid Services (“CMS”) can seek reimbursement from a primary payer and/or the recipient of a primary payment. This article examines the potential risk the MSP statute poses for a health care provider settling a personal injury or wrongful death action, and suggests a solution that allows providers to avoid that risk.

The Problem

Under the current MSP statute,

a health care provider settling a lawsuit and paying any part of the settlement itself is now considered a primary payer (along with any no-fault insurer paying all or part of the settlement on behalf of the provider). As such, and because Congress has given CMS a direct right of action to recover from primary payers, there is a real risk that CMS will pursue reimbursement *directly from the provider and/or its insurer* if the plaintiff fails to promptly reimburse Medicare in full. This risk has recently increased with CMS’s stated intention to more aggressively enforce its reimbursement rights under the MSP statute, and that it will target primary payers (including settling health care providers) and *any* recipients of primary payment funds (including beneficiaries, providers, facilities, suppliers, and even lawyers).

While there are several strategies a settling provider (or its insurer) can use to mitigate this risk, they are often easier in theory than in practice. For example, if Medicare confirms the amount of reimbursement it seeks, the parties can simply have a portion of the settle-

ment paid directly to Medicare. Yet all too often, delays by Medicare in confirming the amount of reimbursement make this impossible. Moreover, given the Eleventh Circuit's recent decision in *Bradley v. Sebelius* (2010), survivor plaintiffs in a wrongful death action may dispute how much of the settlement is actually subject to the MSP statute, and how much is instead protected by the survivors' separate property rights.

Of course, even if Medicare won't confirm the reimbursement amount, the parties can always put an estimated amount into an escrow account for future payment, or include Medicare as a co-payee for a portion of the settlement. But this requires plaintiff's cooperation in determining the proper reimbursement amount, and ultimately plaintiff's agreement to set aside part of the settlement for future payment to Medicare. If plaintiff refuses to cooperate, or incorrectly argues that the Medicare lien is of no concern to the defendant, the provider faces a dilemma: either move forward with the settlement and hope plaintiff reimburses Medicare in full, or delay settling until the reimbursement issue is resolved (but continue incurring litigation costs and risk losing a favorable settlement).

The Solution

Fortunately, there is a procedure by which a provider can reach a favorable settlement *and* avoiding the risk of a subsequent MSP action

by CMS: the provider can interplead the settlement funds. An interpleader is a separate civil action in which the provider alleges that it is facing multiple claims (and thus potential multiple liability), deposits the disputed funds with the court, disclaims its own interest in those funds, and then steps aside to allow the interpleader defendants to litigate their competing claims. (While an interpleader can be brought in state court, it may be removed to federal court by Medicare.)

The interpleader procedure provides three important benefits to a settling provider. The first is finality. Once the interpleader defendants have been served, the provider can bring a motion to be dismissed from the interpleader action and discharged from all future liability relating to the funds. The second is protection. The provider can seek an injunction prohibiting the underlying plaintiff from taking any action to collect on the underlying settlement (or a judgment) outside of the interpleader. And the third is cost efficiency. Interpleader plaintiffs are generally awarded their reasonable attorneys fees for the interpleader action (to be paid out of the interpleaded funds).

In conclusion, an interpleader action can offer an ideal solution when a health care provider attempting to settle a personal injury or wrongful death action has been unable to concurrently resolve its potential liability under the MSP

statute. The provider can accept the settlement, interplead the funds, and obtain a court order discharging it of all future liability.

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