Resolution of Medicare Conditional Payments

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Congress has given the Centers for Medicare and Medicaid Services (hereinafter CMS) both subrogation rights and the right to bring an independent cause of action to recover its conditional payment from "any or all entities that are or were required or responsible . . . to make payment with respect to the same item or service (or any portion thereof) under a primary plan."[1] Furthermore, CMS is authorized under federal law to bring actions against "any other entity that has received payment from a primary plan."[2] Personal injury lawyers have been sued under this provision for failing to repay a Medicare lien. Most ominously, CMS may seek to recover double damages if it brings an independent cause of action.[3] Given all of the foregoing, Medicare subrogation law is a problematic area for personal injury practitioners. The MSPA[4] presents liability concerns for personal injury practitioners because of its complexity, and the difficulty in dealing with Medicare's subrogation bureaucracy.[5]

The government is very serious about its reimbursement rights when it comes to Medicare conditional payments. As an example, in *U.S. v. Harris*, a November 2008 opinion, a personal injury plaintiff lawyer lost his motion to dismiss against the U.S. Government in a suit involving the failure to satisfy a Medicare subrogation claim.[6] The plaintiff, the United States of America, filed for declaratory judgment and money damages against the personal injury attorney

[1] 42 U.S.C. § 1395y(b)(2)(B)(iii) (2007).
[2] *Id.*
[3] 42 U.S.C. § 1395y(b)(2)(B)(iii) (2007).
[4] 42 U.S.C. § 1395y(b)(2)(B)
[5] For a good discussion of the issues relating to conditional payments *see* Jonathan Allan Klein & Annmarie M. Liermann, *Medicare Lien Interests in Liability Settlements – Easy Solutions to Help Resolve Medicare Reimbursement Issues for Beneficiaries and Insurers*, Medicare Secondary Payer Act Reform Task Force (2007).
[6] *U.S. v. Harris*, No. 5:08CV102, 2009 WL 891931 (N.D. W.Va. Mar. 26, 2009), *aff'd* 334 Fed. Appx 569 (4th Cir. 2009).

owed to the Centers for Medicare and Medicaid Services by virtue of 3rd party payments made to a Medicare beneficiary.[7] The personal injury attorney had settled a claim for a Medicare beneficiary (James Ritchea) for $25,000.[8] Medicare had made conditional payments in the amount of $22,549.67. After settlement, plaintiff counsel sent Medicare the details of the settlement and Medicare calculated they were owed approximately $10,253.59 out of the $25,000.[9] Plaintiff counsel failed to pay this amount and the Government filed suit.

A motion to dismiss filed by plaintiff counsel was denied by the United States District Court for the Northern District of West Virginia despite plaintiff counsel's arguments that he had no personal liability. Plaintiff counsel argued that he could not be held liable individually under 42 U.S.C. 1395y(b)(2) because he forwarded the details of the settlement to the government and thus the settlement funds were distributed to his clients with the government's knowledge and consent. The court disagreed. The court pointed out that the government may under 42 U.S.C. 1395y(b)(2)(B)(iii) "recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity." Further, the court pointed to the federal regulations implementing the MSPS which state that CMS has a right of action to recover its payments from any entity including an attorney.[10] Subsequently, the U.S. Government filed a motion for summary judgment against plaintiff counsel. The United States District Court, in March of 2009, granted the motion for summary judgment against plaintiff

[7] *Id.* at *1.
[8] *Id.*
[9] *Id.*
[10] *See* 42 C.F.R. 411.24 (g).

counsel and held that the Government was entitled to a judgment in the amount of $11,367.78 plus interest.[11]

Resolution of the government's interests concerning conditional payment obligations is simple in application but time consuming. The process of reporting the settlement starts with contacting the BCRC (Benefits Coordination Recovery Contractor).[12] This starts prior to settlement so that you can obtain and review a conditional payment letter (CPL).[13] These letters are preliminary and can't be relied upon to pay Medicare from. However, they are necessary to review and audit for removal of unrelated care. Once settlement is achieved, Medicare must be given the details regarding settlement so that they issue a final demand. Once the final demand is issued, Medicare must be paid its final demand amount regardless of whether an appeal, compromise or waiver is sought.[14] Paying the final demand amount within sixty days of issuance is required or interest begins to accrue at over ten percent (10%) and ultimately it is referred to the U.S. Treasury for an enforcement action to recover the unpaid amount if not addressed.[15]

Resolution of Conditional Payments – Appeal, Compromise or Waiver

The repayment formula for Medicare is set by the Code of Federal Regulations. 411.37(c) & (d) prescribes a reduction for procurement costs.[16] The formula doesn't take into account liability related issues in the case, caps on damages or policy limits. The end result can

[11] *U.S. v. Harris,* No. 5:08CV102, 2009 WL 891931 at *5.
[12] *See* https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Attorney-Services/Attorney-Services.html
[13] *See* https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Attorney-Services/Conditional-Payment-Information/Conditional-Payment-Information.html
[14] *Id.*
[15] 42 C.F.R. 411.24(m).
[16] 42 C.F.R. 411.37(c) &(d).

be that the entire settlement must be used to reimburse Medicare. The only alternative is to appeal, which requires you to go through four levels of internal Medicare appeals before you ever get to step foot before a federal judge or compromise/waiver. There is plenty of case law requiring exhaustion of the internal Medicare appeals processes which means that Medicare appeals are a lengthy and an unattractive resolution method.[17] What makes them even more unattractive is the fact that interest continues to accrue during the appeal so long as the final demand amount remains unpaid.

An alternative resolution method is to request a compromise or waiver post payment of the final demand. By paying Medicare their final demand and requesting compromise/waiver, the interest meter stops running. If Medicare grants a compromise or waiver, they actually issue a refund back to the Medicare beneficiary. There are three viable ways to request a compromise/waiver. The first is via Section 1870(c) of the Social Security Act which is the financial hardship waiver and is evaluated by the BCRC.[18] The second is via section 1862(b) of the Social Security Act which is the "best interest of the program" waiver and is evaluated by CMS itself.[19] The third way is under the Federal Claims Collection Act and the compromise request is evaluated by CMS.[20] If any of these are successfully granted, Medicare will refund the amount that was paid via the final demand or a portion thereof depending on whether it is a full waiver or just a compromise.

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[17] A perfect example of this is *Alcorn v. Pepples* out of the Western District of Kentucky. In *Alcorn*, the court held that "Alcorn's claim with respect to the Secretary arises under the Medicare Act because it rests on the repayment obligations set forth under 42 U.S.C. § 1395y. She therefore must exhaust the administrative remedies established under the Medicare Act before this court may exercise subject matter jurisdiction over her claim." Alcorn v. Pepples, 2011 U.S. Dist. LEXIS 19627 (W.D. Ky. Feb. 25, 2011).

[18] 42 U.S.C. § 1395gg
[19] 42 U.S.C § 1395y
[20] 31 U.S.C. § 3711

To summarize, resolution of a Medicare conditional payment is either by following the reduction formulas found in the Code of Federal Regulations or by appeal, waiver and/or compromise. There are multiple considerations before deciding to appeal or seek a compromise/waiver of conditional payments. Certain steps are necessary to resolve a conditional payment which includes audit/verification of the amount after receiving the conditional payment letter and securing a final demand by providing final settlement details to Medicare. Failure to resolve a conditional payment exposes a trial lawyer to personal liability for the amount of the conditional payment and the government does pursue lawyers individually if they fail to reimburse Medicare.