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Plaintiff's Personal Injury Attorneys Are Agonizing Over The New Medicare Reimbursement Laws.

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The growing Medicare shortfall in Washington has many politicians looking for ways to bridge the funding gap. As a result a new law, effective July 1, 2009, has been enacted which requires liability insurers (which include carriers who write CGL policies, auto policies, homeowners' policies and those defendants who are self-insured such as supermarkets) to determine and report whether a claimant is covered and is entitled to Medicare benefits. If the claimant received Medicare benefits during their treatment for the injury, Medicare is holding out both hands to make sure they get 100% reimbursement, despite the comparative negligence of claimant. This new law will pose new challenges for plaintiff's attorney, the insurance carrier for the defendant and the mediator who is attempting to resolve the claim. If the attorney or insurance carrier does not comply, they risk being sued by the Government for reimbursement up to five years post-closure and monetary fines.

What is the new law?

On December 29, 2007, President George Bush signed into law the "Medicare Medical, and SCHIP Extension Act of 2007." The new legislation amends the Medicare Secondary Payer Act (MSA) by establishing new reporting guidelines beginning July 1, 2009. Under the new rules, all liability insurers, and self-insurers will be required to determine whether any individual who files a claim against the insurer or any entity insured or covered by the insurer is entitled to Medicare benefits. If so, the insurer must provide Medicare with that individual's identity and any other information that maybe required under the law. This information must be furnished to Medicare within the time specified by after the claim is resolved through settlement, judgment, award or other payment (regardless whether or not there has been an admission or determination of liability).

If an insurer fails to notify Medicare in accordance with these guidelines, a civil penalty of \$1,000 per day will be charged per claimant. The new legislation clearly indicates a shift in policy which will result in the federal government monitoring general liability claims more closely. The fines represent a new enforcement push by Medicare to hold attorneys and insurers liable.

What does it mean for Plaintiff's Attorney?

Plaintiff's attorney will begin to take a closer look at the case he or she accepts. The attorney should change the client intake form to ask very comprehensive health related questions, whether the client is

entitled to Medicare, how long has he been on Medicare, which type of Medicare and whether the claimant has used Medicare to obtain treatment for his/her injuries. The client should be advised in detail about the new Medicare Recovery Act and that Medicare is looking for 100% reimbursement, not taking into account if there is any comparative negligence. The client should be told there is no hiding from Medicare because it will be notified upon a settlement or judgment and the lien may take months if not years to resolve.

Think twice before accepting a small personal injury case involving Medicare recipients where liability is disputed. A settlement amount will have to cover Medicare charges up to 100%, attorney fees and provide money for the plaintiff. If that type of recovery does not seem likely consider rejecting the case.

However, Baby Boomers are increasing and may be a good part of an attorney's personal injury practice. It is estimated that in the next couple of years, approximately 25% of the Country's population will consist of baby boomers who are Medicare recipients. If the claimant has undergone limited treatment using Medicare and needs additional treatment, consider advising the healthcare provider to bill plaintiff directly or consider finding a doctor who will take the treatment on a lien. This way a Medicare lien will be avoided or at least a very minimal lien incurred. If liability is undisputed, have the medical provider bill the insurance carrier directly.

What if the attorney has a case where Medicare has a substantial lien? If it is before July 1, 2009, consider settling the claim before that time. If you cannot, again advise the client of the new Medicare Recovery Act and the reporting requirements.

If there is a settlement and Medicare does not know about it and mistakenly pays for services it has a right to recover, it can go after the attorneys whose fees are paid out of the settlement. Also the Medicare recipient can lose his or her benefits. Lawyers could be exposed to malpractice claims for not handling a client's benefits properly. Insurers can be liable for monetary fines for failure to report. If a plaintiff loses his Medicare benefits, the plaintiff may bring a legal malpractice claim against the attorney and a bad faith claim against the insurer for not making sure Medicare benefits were protected.

After July 1, 2009, makes sure the claim is settled for an amount that will cover the Medicare lien. It may be possible to comp the lien, but do not count on it. In making settlement demands, assume that you will pay Medicare 100% reimbursement in what is paid out. Make sure all charges refer to the injuries that your client sustained. Medicare will not be speedy to resolve these claims, so discuss with the client about holding the amount in a trust account until the CMS lien is resolved rather than disbursing the entire amount owed to plaintiff.

It is unknown whether plaintiff's attorney will have to worry about set asides calculations for future medical care and submit them to Medicare for approval. Currently, there is no formal process of liability settlements for future medical care.

Finally, negotiations with the liability insurance carrier will become more difficult. They will demand information about your client, such as social security number, so that they can comply with the requirements and avoid fines. Also, even though Medicare may ignore the comparative negligence issues, Insurance adjusters will take the position that despite Medicare's 100% reimbursement, it will not pay 100% of the medical bills. An insurance carrier will not want to increase the cost of a claim and stand firm on its position.

This new law will pose challenges for the plaintiff's attorney who is attempting to resolve the claim. The key is to be aware of the Medicare Reimbursement Act, and to prepare the parties prior to a settlement of the barriers that the Medicare Recovery Act may present.

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