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Update on Medicare Conditional Payment Enforcement Actions

In March 2020, the U.S. Attorney's Office, as an enforcement arm of the U.S. Department of Justice, filed a lawsuit on behalf of the Department of HHS and its sub agency, CMS, against an attorney in Texas alleging failure of the attorney representing a party injured in a motor vehicle collision to properly reimburse Medicare for conditional payments. The case is U.S. v. Carrigan & Anderson, Case 4:20-cv-00991, Filed 03/18/2020 in U.S. District Court for the Southern District of Texas, Houston Division.

That would not really seem like big news as we have written about several conditional payment enforcement actions by the U.S. Attorney's Office/Department of Justice over the past few years against plaintiff attorneys for a failure to properly inquire with CMS's Beneficiary Coordination & Recovery Center (BCRC) contractor and address amounts to be reimbursed to CMS.[1]

However, unlike some of the other cases, the plaintiff attorney in this case took proactive steps attempting to address Medicare's past interests in the liability settlement. Unfortunately, the steps taken were misguided. Had the attorney requested a compromise or waiver and/or appealed the demand amount by CMS, he would have likely faired better.

Prior to settlement, the attorney properly provided notification of the claim to the BCRC triggering the search by the BCRC for claim related conditional payments. The case settled for $70,000.00 and the plaintiff attorney provided notification of the settlement to the BCRC. Presumably, the plaintiff and attorney had received a copy of an earlier Conditional Payment Letter. Within a few weeks after the settlement notification was provided, the BCRC delivered a demand letter in the amount of $46,244.74, demanding payment within the standard 60 day time period from the date of the demand and informing of the right to appeal its demand amount.

The attorney creatively filed a motion with a state court in Texas challenging the amount demanded by Medicare and provided notice of same to the BCRC. He called the motion, Motion To Determine Portion of Plaintiff's Settlement That Constitute Reimbursement of Medical Payments Made in and Regarding Settlement. The court reviewed submitted evidence including an affidavit signed by plaintiff counsel suggesting the claim settled at 1/10th its full case value, and issued an order reducing the amount to be paid to Medicare by 90% to a figure of $4,700.00. Plaintiff counsel submitted a copy of the order to the BCRC. The full demand amount went unpaid and began accruing interest at nearly 10% APR on the 61st day post-demand (for current demands, the annual interest percentage rate is now over 10%).

As of March 18th, 2020, when the U.S. filed its recovery action in U.S. District Court, the alleged reimbursement amount had increased to $53,445.93 including interest. The U.S. requested recovery of its fees and costs but interestingly did not request double damages.

The U.S. Attorney's position is that state courts lack authority to make determinations of federal law including amounts owned to Medicare under the Medicare Secondary Payer Act, 42 U.S.C. Section 1395y(b)(2) (MSP). Furthermore the complaint asserts that because there is an administrative procedure in place under the current MSP regulations, if the plaintiff and attorney disagreed with the demand amount, the administrative appeals process should have been followed, i.e. that there was a failure to exhaust administrative remedies, an express condition precedent to seek redress in U.S. District Court for appeal of Medicare Initial Determinations such as the amount of a demand or a denial of a waiver.

Take Aways

Dispute and Appeal

- Review each conditional payment letter to verify each reimbursement claimed is injury related
- Dispute all non-injury related claims in a timely manner before the matter settles or before CMS issues its final demand
- If unhappy with a CMS reimbursement of conditional payment demand, consider appealing through CMS's administrative appeals process
- You have 120 days to request a first level appeal in writing

In the meantime, consider one of the other post demand dispute processes allowed that may offer your client relief from what you consider to be an unreasonable demand. Depending on the outcome, the appeal may not be necessary.

Compromise Requests

- Requesting a compromise to the BCRC offering a sum certain to resolve the claim laying out arguments based in equity similar to the ones made to the state court judge in the case above and/or according to regulations governing compromises by the U.S. Government existing in the CFR
- Compromise requests are forwarded by the BCRC to the applicable CMS Regional Office (RO) and a response is provided within 45 days of the BCRC's receipt of the request
- Responses will either be accepted, countered, or rejected

Waivers

- If not happy with the response to the compromise request and if the financial condition of the plaintiff is such that they have a hard time meeting their day to day living expenses, a waiver request could be an alternative option
- Waiver requests entail filling out a detailed Social Security Administration financial form called the SSA 632-BK
- To make its decision, CMS will evaluate resources of the plaintiff, income, the amount of the settlement, outgoing expenses, and hardship factors and may take up to 120 days from start to finish so you need to be mindful of the appeal deadline for the original demand.

[1] January 2020 DOJ US Attorney https://www.medivest.com/philadelphia-based-personal-injury-law-firm-agrees-to-resolve-allegations-of-unpaid-medicare-debts/ Philadelphia plaintiff firm settles for $6,604.59,

Nov 2019 US Attorney General – **Baltimore plaintiff firm settles with Medicare for $91,406.98**

March 2019 DOJ US Attorney – **Maryland plaintiff firm settles with Medicare for $250k**

June 2018 DOJ US Attorney – **Philadelphia plaintiff firm settles with Medicare for $28k**