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Is Paying a Third Party Liability Medicare Lien Really Only the Concern of the Plaintiff?

On Friday August 21, 2020, the U.S. Attorney's Office for the Middle District of Pennsylvania announced a **\$53,295 settlement** of Medicare Secondary Payer Act, 42 U.S.C. §1395y(b)(2) ("MSP") debt. The settlement described in the press release demonstrates the U.S. Government's continued interest and intent in enforcing the recovery provisions of the MSP.

Headlines on MSP recovery often focus on plaintiff attorneys who fail to adequately address Medicare conditional payment reimbursement claims, often called Medicare liens by attorneys and Medicare beneficiaries. However, at fault parties and their insurance carriers need to pay close attention to these MSP recovery actions. That is because the MSP provides for joint and several liability of primary plans such as liability carriers and self-insureds, including the potential for double damages, even after settlement proceeds have been paid and a release has been signed.

While the plaintiff attorney is the focus of the headline "Harrisburg Law Firm Pays \$53,295 To Reimburse Medicare Program" the press release indicates that one of the defendants in the underlying improper drug dispensing case, paid \$33,750 of the \$53,295 to the U.S. for settlement of the MSP debt. Insurance carriers or self-insureds sometimes insist on forwarding the lien payment to Medicare because they don't want to pay a

settlement to the plaintiff, only to later be asked to pay the Medicare portion (or more) again, if the plaintiff's attorney has not timely paid the lien.

There is no information about why the plaintiff's firm did not pay the amount demanded, but ultimately paid \$19,545.15 toward the debt in this settlement with the U.S. Government. The conditional payments were described in the press release as being \$84,353 with the ultimate settlement amount being \$53,295. This seems to indicate that a 36.82% procurement cost reduction was allowed. The settlement did not include a double damages request or even include any additional interest.

It is not clear from the press release whether there were any appeals over the amount of Medicare's demand "determination" that led to the delayed payment of the lien and whether the release agreement contemplated the defendant/primary plan agreeing to pay the Medicare debt from withheld settlement funds. Did the parties do their due diligence in investigating the debt? Did they coordinate with each other over whether any Conditional Payment Letters contained amounts not related to the claimed/released injuries? Did they coordinate their respective settlement notification/reporting to make sure that the ICD codes reported from the plaintiff and defense were aligned, and to help prevent an overreach in the future by Medicare in potentially flagging more than just injury related claims.

Could it have been similar to the recent *Osterbye* case in which the parties seemed to rely on Conditional Payment Letters as opposed to the official Medicare demand at the time of settlement. See *JOSEPH C. OSTERBYE, as Administrator of the ESTATE OF...*, Slip Copy (2020) 2020 WL 3546869, June 30, 2020. In *Osterbye*, the Administrator of an estate of a deceased Medicare beneficiary sued the U.S. Government and the primary plan defendant alleging that there was a mistake of fact as to the amount owed to Medicare when the plaintiff failed to recognize that two files had been opened for the same case. The plaintiff alleged that the defendant had "initiated" a separate conditional payment claim with Medicare without disclosing to plaintiff the amount of the separate conditional payment amount and arguing that plaintiff would not have settled the case if he had known that Medicare had a lien for over \$100,000.00. At the time of settlement, the Conditional Payment Letter that the plaintiff was in possession of only indicated about \$13,000.00 in conditional payments. In *Osterbye*, the NJ U.S. District Court denied the defendant's motion to dismiss on the basis that the settlement may have been entered into based on mistake of fact indicating that the facts of the settlement will have to be investigated. A similar issue was also addressed in the *Langone* state court case referenced in a [prior blog article](#) where parties mistakenly relied on Conditional Payment Letters instead of a demand letter.

Take Aways:

While some insist MSP recovery obligations are solely a plaintiff's concern, defendants should pay close attention to make sure the debt is satisfied or otherwise resolved – Medicare will issue a case closed letter once the debt is satisfied even when a compromise is reached for an amount lower than the demand

Not all courts will be as accommodating to the plaintiff's attorney as in the *Osterbye* Court. Instead of a second bite at the settlement apple, the plaintiff's attorney in *Osterbye* could have just as easily been accused of legal malpractice by the injured party, if there was a lack of disclosure or lack of competence by the attorney in verifying the proper amount of Medicare's demand

Plaintiff and defense should cooperate with each other over what steps are being taken to confirm conditional payment resolution, including whether either party has hired a third party to investigate, audit, and/or negotiate the demand balance

Both parties should know that it is imperative to obtain a demand letter as opposed to a Conditional Payment Letter prior to settling a case unless the correct procedures have been taken via the Medicare Secondary

August 27, 2020 by [Robert Hlozek](#)

info@medivest.com

Payer Recovery Portal to provide the 120 day anticipation of settlement notification and to request the Final Conditional Payment Calculation within 3 days of a settlement the details of which need to be timely reported

Plaintiff attorneys should be proactive in addressing Medicare's past interests in a settlement by auditing payment summary forms to dispute non-injury related items, should timely notify Medicare of the settlement details to obtain procurement cost reductions, and should also consider whether lien resolution via **waiver** or **compromise** of the procurement cost reduced demand may be a suitable option to help the injured party retain more of the settlement proceeds.