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The MSP Act's hidden remedy

Dealing with Medicare reimbursement may be difficult, but the Medicare Secondary Payer Act provides a little-understood private cause of action that may strengthen your client's case.

RICHARD NEUWORTH AND KEVIN I. GOLDBERG

One of the greatest obstacles to settling our clients' personal injury and medical malpractice cases efficiently is resolving outstanding Medicare liens. Attorneys often complain about the Centers for Medicare and Medicaid Services' slow response.

Further complicating matters, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003¹ (MMA) and the Medicare, Medicaid, and SCHIP Extension Act of 2007² contain important changes that may suggest that attorneys must set aside portions of their clients' settlements to reimburse Medicare for future accident-related payments, as workers' compensation claimants must do.³

Although resolving Medicare liens is tricky, hidden in the statutory morass is a diamond in the rough: an enforcement provision that gives Medicare beneficiaries a private cause of action allowing them to sue for double the amount Medicare is entitled to. Lawyers often overlook this private cause of action, but we can use it to bolster our clients' cases and encourage more efficient and more timely settlements.

The private cause of action is part of the Medicare Secondary Payer (MSP)

Act. It provides: "There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2) (A)."⁴

Congress added the private cause of action to the MSP statute in 1986.⁵ Although there is no specific legislative history explaining the purpose of the private right of action, courts have concluded that its purpose is to help the government recover its fair share of payments made as a result of tortious conduct toward Medicare beneficiaries. The private cause of action helps the government recover conditional payments from insurers or other primary payers, encourages private parties to enforce Medicare's rights, and saves money for the Medicare system.⁶

The premises underlying the MSP private cause of action are:

■ "[T]he beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses.

■ [W]ithout the double damages, the beneficiary might not be motivated to take arms against a recalcitrant insur-

er because Medicare may have already paid the expenses and the beneficiary would have nothing to gain by pursuing the primary payer.

■ With the private right of action and the double damages, the beneficiary can pay back the government for its outlay and still have money left over to reward him for his efforts."⁷ (If Medicare has paid \$100,000, it gets \$100,000, and the plaintiff gets \$100,000.)

The 2003 amendments to the MMA, found in Title III, were specifically enacted to overturn court decisions that limited the effectiveness of the MSP private cause of action.⁸ The amendments made it easier for injured Medicare recipients to bring these private actions on Medicare's behalf against an expanded class of entities and individuals with insurance, and they clarified when such entities and individuals must pay the Medicare beneficiary's medical expenses. Three critical amendments establish that:

■ All businesses, trades, and profes-

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sions are deemed to have insurance regardless of whether they carry their own risk.⁹

■ A judgment or payment—including a settlement—conditioned on the recipient's compromise, waiver, or release of claims against the tortfeasor (whether or not there is a determination or admission of liability) demonstrates a plan's responsibility to reimburse Medicare.¹⁰

■ Reimbursement to Medicare is no longer tied to anticipation of prompt payment.¹¹

This legislation expanded the possible defendants for the private cause of action. Possible defendants now include the tortfeasor (even if the tortfeasor is a business, trade, or profession without insurance), the tortfeasor's insurance company, and the plaintiff's self-insured employer or the third-party administrator of his or her health insurance plan.

Before the 2003 amendments, it was not clear whether Medicare had a right of reimbursement from certain self-insured defendants; it is now crystal clear that Medicare's right of reimbursement applies to almost all tort settlements in which Medicare payments have been made on the tort plaintiff's behalf.¹²

As part of the amendments, Congress went further and applied the amendments retroactively to the passage of the original MSP Act in 1980.¹³

Case law

Court decisions since the 2003 amendments were enacted have consistently allowed the private cause of action to proceed against insurers and similar entities, including employers, who are deemed responsible for the tort victim's injuries.

For example, in *O'Connor v. Mayor City Council of Baltimore*, the plaintiff John O'Connor, brought an MSP private cause of action against his employer, Baltimore City.¹⁴ O'Connor suffered from mesothelioma as a result of exposure to asbestos while working for the city, and this illness caused him incur substantial medical bills. The Maryland Workers' Compensa-

tion Commission found that his mesothelioma resulted from his employment and ordered Baltimore City, which is self-insured, to pay his related medical bills. Despite this order, the city did not pay O'Connor's bills; Medicare paid them.

O'Connor filed a private cause of action for double the amount that Medicare paid, and the city filed a motion to dismiss, arguing that O'Connor did not have standing to file suit. The court denied the motion and explained that "the MSP statute's citizen suit provision exists

Based on what the court held in this case, the plaintiff in a similar situation could file a private claim against the health plan on Medicare's behalf.

Similarly, in *Telecare Corp. v. Leavitt*, the U.S. Court of Appeals for the Federal Circuit held that Medicare can assert its rights even against an employer that sponsors or contributes to a group health plan.¹⁷ Because Medicare may assert its rights against such employers, injured tort plaintiffs presumably have the right to pursue the MSP private cause of action for double damages against

The private cause of action helps recover conditional payments from primary payers, encourages private parties to enforce Medicare's rights, and saves money for the Medicare system.

to redress exactly this type of injury."¹⁵

Another case, *Brown v. Thompson*, does not directly involve the private cause of action, but it provides an excellent example of the expanded class of entities that the MSP private cause of action can be brought against, in light of the 2003 amendments.¹⁶ Jeanette Brown, who was insured through Kaiser Foundation Health Plan, was admitted to the hospital for 42 days with a perforated colon. Brown filed suit against Kaiser for medical malpractice, alleging that the Kaiser doctors failed to promptly admit her to the hospital. Medicare paid the bills for her hospitalization. Brown and Kaiser settled the lawsuit, and Medicare asserted a lien to recover its payments.

Brown filed a declaratory judgment action, arguing that the Medicare lien was invalid because, when Medicare made the payments, there was no expectation of prompt payment from Kaiser and because Kaiser did not qualify as a "primary plan." The court held that Medicare's lien was valid and explained that the 2003 MMA amendments clarify that Medicare's right to reimbursement is *not* conditioned on prompt payment—and that Kaiser qualifies as a self-insured primary plan.

such entities.

Other cases decided since the 2003 amendments have held that the private cause of action is not a qui tam action, so it can be brought only by the person who was injured and whose medical bills were paid by Medicare.¹⁸ A qui tam action can be brought by uninjured parties, provided they have paid some of the injured party's medical bills related to the personal injury.

A valuable tool

Lawyers representing tort victims should understand the MSP private cause of action and consider how and when to use it to advance their clients' interests. Before a case goes to trial, lawyers need to consider whether using the threat of an MSP private cause of action would increase the settlement offer or bring a reluctant defendant to the settlement table. They should keep in mind that the MSP private cause of action can be brought as a separate count in a personal injury lawsuit—or it can be brought after obtaining a judgment against the defendants. The ideal timing depends on the facts and circumstances of the case.

Many adjusters, mediators, and even defense attorneys do not understand the

scope of exposure under the MSP private cause of action. Plaintiff lawyers must educate their adversaries about the double exposure and how the 2003 amendments to the MSP statute and court cases expand the class of entities with direct exposure to damages beyond the tortfeasor.

In fact, almost any public or private entity and its individual employees, acting in the scope of their employment, can be sued under the MSP statute (to the extent of their liability insurance coverage) for all acts of negligence that

letter can also bolster a bad-faith case in the event that the insurance company does not make a reasonable settlement offer within policy limits and a verdict in excess of the limits is obtained. In the subsequent bad-faith lawsuit, the fact that the adjuster or defense attorney failed to consider the double damages allotted to the MSP private cause of action can serve as evidence that the insurance company did not properly evaluate the claim.

Medical malpractice cases. You should consider filing an MSP claim in

sue the medical malpractice claim. The attorney sends a demand letter to the nursing home and its insurance carrier. The carrier denies the claim, alleging that the nursing home staff was not negligent. The case proceeds to trial, and the jury finds in the plaintiff's favor and awards \$750,000, including \$100,000 for medical expenses relating to treatment of the ulcers.

The patient could now bring a second lawsuit against the nursing home and its insurer for an additional \$200,000—double the amount of medical expenses Medicare paid—under the MSP Act. Attorneys may want to reconsider nursing home cases that they previously would have rejected because of lack of noneconomic loss or lack of permanent injury.

Medical malpractice attorneys representing injured Medicare beneficiaries need to understand this private cause of action and use it effectively as a negotiating tool—and, if the case ultimately goes to trial, as an opportunity to obtain further compensation for the client. In cases that go to verdict, attorneys should at least advise their clients that an MSP private cause of action exists.

General personal injury cases. The MSP Act's private cause of action may help you pursue general personal injury cases as well.

For example: A 68-year-old man is injured in an automobile accident and undergoes numerous surgical procedures. He then goes to a rehabilitation center for several months to recuperate, and he learns how to take proper care of his injuries. He incurs \$250,000 in medical expenses for the extended hospital stay, surgeries, and rehabilitation. Medicare pays these bills.

The driver of the vehicle that struck your client has \$1 million in liability insurance coverage. (Some states have caps on noneconomic damages that are far lower than these policy limits.) The liability insurance carrier for the defendant driver considers the state's cap on noneconomic damages and the company's potential exposure in the case, and it makes an extremely low settlement offer, reasoning that because

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result in medical expenses being paid by Medicare. Entities with direct exposure now include liability insurance carriers, health insurance companies, HMOs, nursing homes, third-party administrators, and employers of Medicare beneficiaries.

Settlement negotiations. When writing a demand letter to the insurance company or defense attorney, consider including a citation to the MSP statute, with an explanation that the defendant's medical economic loss exposure is actually double the amount of the medical bills that Medicare paid.¹⁹

Insurers will not reserve for the MSP claims unless the attorneys involved educate them about the consequences of not only losing the underlying action, but also having to defend against a second lawsuit for double damages concerning the medical expenses. In certain cases, this possibility alone will force the insurance company to consider offering the policy limits. Proper use of the MSP private cause of action during settlement negotiations with the insurance company in a disputed liability case can motivate the company to make a settlement offer that it otherwise would be unwilling to make.

Including an MSP claim in a demand

any medical malpractice case in which the injured person is a Medicare beneficiary by the time a verdict is rendered. Because almost all nursing home patients are over 65, Medicare has a lien on almost all tort recoveries resulting from medical malpractice in nursing homes.

When the nursing home and its insurance carrier fail to accept financial responsibility for the injuries that their negligent acts cause—and instead allow Medicare to pay for the injured resident's care—they deprive the plaintiff of the compensation he or she is entitled to. And they unknowingly expose themselves to liability for double the amount that Medicare paid for care expenses.

For example, assume that a nursing home patient develops stage III pressure ulcers because the nursing staff failed to follow well-established guidelines. As a result of the nursing home's negligence, the patient requires several surgical procedures and advanced levels of care that would not have been necessary but for the negligence. Medicare pays \$100,000 in medical bills for the surgical procedures, aftercare, and rehabilitation.

The patient hires an attorney to pur-

of the cap, any potential verdict will fall within the \$1 million policy limits. The case goes to trial, and the verdict is \$915,000—more than the insurance carrier had hoped to pay, but still within its insured's policy limits. The insurance company pays the verdict and assumes that the matter is resolved.

After receiving this payment, the injured man could then bring a second cause of action under the MSP Act for an additional \$500,000 (double the amount paid by Medicare) against the tortfeasor and the liability insurance

Eleventh Circuit held that an alleged tortfeasor's responsibility for paying a Medicare beneficiary's medical costs must be demonstrated before an MSP private cause of action can correctly be brought.²¹

If you have obtained a judgment in the underlying tort action or workers' compensation case, the MSP private cause of action has important advantages over other remedies in state and federal personal injury law. For instance, based on the doctrine of offensive collateral estoppel²² when a mone-

baby boomers will become eligible for Medicare.²³ These numbers show how important the MSP private cause of action can be to personal injury and workers' compensation practitioners and their injured clients. ■

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company. If the insurer had understood its exposure under the MSP Act and taken this secondary cause of action into consideration before trial, it would have had to make a more reasonable settlement offer, because its actual exposure (\$1.415 million) significantly exceeds its insured's policy limits.

Personal injury attorneys must make insurance carriers aware of this secondary exposure and use this possibility to increase the likelihood of obtaining a fair settlement offer.

Other considerations

Since there is no separate statute of limitations for bringing the MSP private cause of action, lawyers should assume that the forum state's general statute of limitations applies.²⁰ A word of caution, however: If you bring an MSP private cause of action in state court along with the underlying tort claim, you will subject the lawsuit to removal to federal court. Therefore, if you prefer to keep your client's case in state court, you should wait until the underlying tort claim is resolved before proceeding with the MSP claim.

If you are considering using this cause of action as a way to bolster your client's case, you should know that the

tary judgment has been obtained in the underlying tort action at trial, or if a finding of compensability is made by an administrative agency, the third-party wrongdoer is barred from re-litigating liability issues in any subsequent action brought under the 2003 amendments. However, a settlement payment probably does not mean that the underlying action cannot be re-litigated. So if the parties settle the case, the third-party wrongdoer may be able to re-litigate liability issues in an MSP action, but if the case is tried, he or she cannot.

Another advantage is that the only issues in the MSP action are the determinations of whether Medicare paid and whether appropriate reimbursement was made by the primary plan. Therefore, the MSP private cause of action can most likely be resolved on summary judgment without the need for expensive expert testimony and a jury trial.

Congressional action has strengthened the MSP private cause of action, and personal injury lawyers should use its double damages provision to benefit their clients. Currently, 44 million beneficiaries are enrolled in the Medicare system. In the next two decades, it is estimated that an additional 80 million

Notes

1. Pub. L. No. 108-173, 117 Stat. 2066 (2003).
2. This new law will require that insurance companies report all personal injury settlements to the Centers for Medicare and Medicaid Services after July 1, 2009. See 42 U.S.C. §1395y(b)(8) (2008).
3. See Matthew L. Garretson, *Making Sense of Medicare Set-Asides*, TRIAL 64 (May 2006), www.justice.org/cps/rde/xchg/justice/hs.xsl/4814.htm; William L. Winslow, *The Uncertain Future of Medicare Set-Asides*, TRIAL 56 (Mar. 2008), www.justice.org/cps/rde/xchg/justice/hs.xsl/685.htm.
4. 42 U.S.C. §1395y(b)(3)(A) (2007).
5. Pub. L. No. 99-509, §9319, 100 Stat. 1874 (1986) (codified as amended at 42 U.S.C. §1395y(b)(3)(A)).
6. See *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 524-25 (8th Cir. 2007).
7. *Id.* at 524-25; see also *Manning v. Util. Mut. Ins. Co.*, 254 F.3d 387, 391-92 (2d Cir. 2001).
8. Pub. L. No. 108-173, 117 Stat. 2066, 2222 (2003).
9. 42 U.S.C. §1395y(b)(2)(A)(ii).
10. 42 U.S.C. §1395y(b)(2)(B)(ii).
11. 42 U.S.C. §1395y(b)(2)(A).
12. See *Brown v. Thompson*, 374 F.3d 253 (4th Cir. 2004) (explaining that the 2003 amendments establish and clarify the law, and that it is clear that settlement proceeds in a medical malpractice case from a health plan to the tort plaintiff were considered to be from a "primary plan" under the MSP Act).
13. Pub. L. No. 108-173, 117 Stat. 2066 (2003).
14. 494 F. Supp. 2d 372 (D. Md. 2007).
15. *Id.* at 374.
16. 374 F.3d 253.
17. 409 F.3d 1345, 1352 (Fed. Cir. 2005).
18. See e.g. *Stalley*, 509 F.3d at 525; see also *Manning*, 254 F.3d at 394-95 (discussing the differences between the MSP Act and federal False Claims Act, which provides for a qui tam action); *Glover v. Liggelt Group, Inc.*, 459 F.3d 1304 (11th Cir. 2006) (per curiam).
19. See 42 U.S.C. §1395y(b)(3)(A).
20. It should be noted that the Second Circuit held that the statute of limitations for the MSP private cause of action is six years, based on its similarity to the False Claims Act. *Manning*, 254 F.3d at 395.
21. *Glover*, 459 F.3d at 1309.
22. See e.g. *Sedlack v. Braswell Serus. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998); *Parklane Hosier Co. v. Shore*, 439 U.S. 322, 330-31 (1979).
23. Richard Wolf, *Social Security Hits First Wave of Boomers*, USA Today (Oct. 9, 2007), www.usatoday.com/news/washington/2007-10-08-boomers_N.htm.