



THE INCREASING MALPRACTICE RISK IN MEDICARE AND MEDICAID MATTERS

Medicare Liens On Personal Injury Awards

By law Medicare may recoup payment of medical expenses by placing a lien on money received by Medicare beneficiaries from third parties for these expenses. Medicare is aggressively asserting this right by asserting liens on Medicare payments recovered by beneficiaries in personal injury awards. Medicare liens are also likely in workers' compensation and elder law cases involving medical expenses.

The lawyer's risk in failing to anticipate a Medicare lien is aggravated by the fact that there is no notice requirement for a Medicare lien and no statute of limitations on when it may be asserted. Medicare's position is that they may seek payment from all those involved in the disbursement of recovered medical expenses including the lawyer representing the Medicare beneficiary. Thus, the beneficiary-client and the lawyer are exposed indefinitely to a Medicare lien on a personal injury award that includes an amount for covered medical expenses. Additionally, criminal and civil fraud penalties may apply to situations when a lawyer is aware Medicare paid for medical expenses recovered from third parties, but fails to notify Medicare.

How to manage the Medicare lien risk:

- 📄 Advise clients at the inception of the representation that any award will be reduced because all recovered Medicare medical expense payments must be reimbursed.
- 📄 Include in the client's letter of engagement that reimbursement of Medicare medical expense payments will come from the client's share of any recovery – not from the lawyer's fee. In cases of substantial Medicare payments, alert clients that reimbursement of these benefits will significantly reduce the recovery. Get the client's written consent for the lawyer to pay Medicare's claim from the award.
- 📄 Be aware that a lawyer has a duty to initiate contact with Medicare when there is knowledge of a Medicare entitlement to reimbursement. Be sure to comply with Kentucky Rule of Professional Conduct 1.15 Safekeeping Property that provides:
 - (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
 - (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- 📄 Ascertain from Medicare how much they are claiming and then attempt to negotiate a reduction. Be sure to conduct the negotiations with Medicare before a case is settled or tried so litigation strategy can be adjusted, if feasible.
- 📄 Examine every bill to verify what portion Medicare paid. Be sure that medical expenses not related to the award are not included in the Medicare claim.
- 📄 Do not rely on the client to pay Medicare. The safest practice is for the lawyer to pay Medicare from the award before making disbursement to the client.
- 📄 Obtain a release from Medicare after settlement with them.

ERISA health plans are following Medicare's lead in more frequently seeking reimbursement for medical expenses recovered from third parties. For more on this development and Medicare liens see the article *Personal Injury Awards Are Being Attacked by Medicare, Health Plans – Plaintiffs' Lawyers May Be Personally Liable* by Sylvia Hsieh, *Lawyers Weekly USA*, 2001 LWUSA 329 (4/30/01).

Medicaid Annuities

The use of annuities to reduce assets to qualify for Medicaid is a common practice in many states. The purchase of an annuity by the spouse requiring nursing home care avoids Medicaid ineligibility and provides the well spouse a stream of income. Elder law experts maintain that current rules allow this practice as long as the annuity is for a term certain and is actuarially sound, i.e., the annuity is paid out within the life expectancy of the annuitant as established by federal standards.

Recently several states have begun treating Medicaid annuities as improper transfers for Medicaid eligibility computations. States taking this position include Kansas, Pennsylvania, and Ohio. This development is further evidence that Medicare and Medicaid authorities are aggressively managing benefit eligibility and conserving agency funds by careful expenditure and recovery actions. Lawyers must review state Medicaid eligibility rules applicable to a client before providing any advice about annuities. The risk that a state currently allowing Medicaid annuities may change its policy should be stressed. Some clients seek legal advice having previously purchased an annuity from an insurance agent representing that the annuity will protect assets. If this is in error, the client must be advised and legal action against the agent may be necessary to resolve the client's Medicaid eligibility.

Patrick Manley worked for eight years determining financial eligibility for Medicaid programs. He offers this risk management advice in his article *Bothersome Brambles on the Path of Planning for a Client's Nursing Home Need*, (Vol. 9, No. 3, 3/3/01, *The Risk Management Report and On the Docket*, ALPS):

👉 Begin an estate planning representation with Medicaid implications by explaining the difference between Medicare and Medicaid. They are easily confused and misunderstood by all

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"One must remember that the stock market is as unsentimental as the weather report."

B. Marchand Sage

concerned. Manley recommends the explanation be given in terms of:

✔ **“Medicaid assistance”** — Assistance stresses the welfare and need-based nature of Medicaid. It is often useful to then provide information on various Medicaid programs such as assistance with long term nursing facility costs.

✔ **“Medicare coverage”** — Coverage stresses that Medicare is in the nature of an insurance program and qualitatively differs from a need-based assistance program.

➡ Inform the client in writing that the proposed estate plan could lead to the client needing welfare. Explicit language should be included that if Medicaid views the estate plan as creating eligibility the client will be disqualified for benefits.

➡ Urge the client to visit a nursing home and discuss with management any differences between what a privately funded resident receives and a Medicare funded resident receives. [Note: While medical care is required to be the same, there are quality of life differences in other services offered.] Assuring that a client understands all the implications of Medicaid nursing home assistance substantially reduces the risk of a claim that the results of the estate plan were not properly explained.

Source: “States Crack Down on Medicaid Planning” by Sylvia Hsieh, *Lawyers Weekly USA*, 2001 LWUSA 529 (7/9/01).

“It’s not the bulls and bears you need to avoid – it’s the bum steers.”

Chuck Hills

ASSISTING PRO SE REPRESENTATIONS CAN BE RISKY BUSINESS

Be aware of the risk assumed when helping people who will appear *pro se*. Some lawyers giving *pro se* litigants assistance apparently think that because they will not appear in court there is no malpractice exposure. They are wrong! Others in disengaging from a difficult matter provide advice or draft pleadings for a client determined to appear *pro se*. This is done either as a professional courtesy or as a gesture intended to placate a soon to be former client who might file a bar complaint or malpractice claim. This only serves to continue the lawyer’s exposure to a malpractice claim because if anything goes wrong the client will blame the lawyer.

Providing assistance to a person appearing *pro se* is a limited scope representation that requires client consultation and consent. The limited representation should be explained by covering what the lawyer will do and not do and the risk of proceeding on that basis. Remember that a lawyer has a duty to explain all the legal implications of a client’s situation – not just those that are pertinent to the limited representation — and that the scope of representation cannot be so limited as to waive lawyer competence or require the client waive a malpractice claim.

Drafting pleadings for *pro se* clients is a sensitive issue – must the drafting attorney sign the pleading? The only known Kentucky authority on point is KBA Ethics Opinion 343 (1991). The Ethics Committee approved limiting a representation to assisting in drafting pleadings for indigents. The opinion adopted the majority view that the attorney’s name should appear on the

pleading even though representation is limited to its preparation. For a more detailed discussion of limited scope representation log on to www.lmick.com, and read the article *Limited Scope Representation – Where L.A. Law Meets Home Improvement* in the Bench & Bar section.

“The difference between playing the stock market and the horses is that one of the horses must win.”

Joey Adams

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