



From The Bench

legal news of interest

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The Effects of Medicare, Medicaid and ERISA on Personal Injury Recoveries

by Kimberly R. Louper

You have negotiated the perfect settlement. The plaintiff is happy, the plaintiff's attorney is satisfied and the insurance company is pleased. However, the plaintiff's medical provider asserts a statutory right to reimbursement or a lien with respect to medical expenses it paid on behalf of plaintiff out of the settlement amount, suing the plaintiff, defendant and the defendant's insurance carrier. Can the medical provider recover?

Always know the legal relationship between the medical provider and the claimant. Whether the medical provider is Medicare, Medicaid, a public hospital or ERISA will determine the legal rights of the provider and will impact settlement.

Prior to the enactment of the Medicare Prescription Drug, Improvement, and Modernization Act which was enacted in late 2003, the U.S. Fifth Circuit in *Thompson v. Goetzmann*² held Medicare did not have any lien rights with respect to recovery in that case. In *Thompson*, Medicare paid medical expenses of \$143,881.82 for the plaintiff's medical treatment. Without admitting liability, the defendant paid plaintiff a lump sum settlement of \$256,000.00. Medicare then filed suit against plaintiff, defendant and the plaintiff's attorney. The Fifth Circuit dismissed the entire claim, holding the defendant was not a "primary plan" within the meaning of Medicare Payer Provisions, defendant was not required to pay "promptly," and the Medicare Payer Provisions did not require payback by the claimant or the claimant's attorney.³

Responding to *Thompson*, Congress passed the Medicare Prescription Drug Act, providing *all* parties or entities involved in a claim are subject to the Medicare reimbursement provisions and are even statutorily exposed to interest and double damages (paying twice the amount of the Medicare lien) with respect to medical costs advanced by Medicare. The Act also eviscerated the *Thompson* holding by expanding the definition of "primary plan."⁴ In addition, the Act preserves the "private cause of action," allowing private persons the right to pursue a claim for double damages on behalf of Medicare, enabling protection of Medicare if its interests have been prejudiced. In effect, Medicare is allowed to "follow the money."

On the other hand, if a plaintiff's treatment has been paid for by Medicaid, one must also be aware of the reimbursement/lien rights of that entity, as provided in *LSA-R.S. 46:446 - 446.5*. Medicaid, a creature of state law funded by the federal government, is subrogated to the rights of the recipient and may intervene in an existing suit or pursue its own claim against the responsible parties. A plaintiff/recipient is to serve a copy of any suit on the Louisiana Department of Health and Hospitals (DHH). Once DHH has sent notice, intervened or pursued its own claim, any settlements without its approval do not impact DHH's rights. Thus, DHH should be included in any settlement negotiations. Otherwise, one may be subject to paying twice: once to the plaintiff, and once to Medicaid.

If the plaintiff has been treated at a public or veterans' hospital that has provided free treatment, incurring the expense of plaintiff's treatment, the public hospital will have lien rights similar to Medicaid. Pursuant to *LSA-R.S. 46:8 - 46:12*, the notice requirement concerning public hospitals is the same as Medicaid. However, the law also provides, "no court ... shall proceed with the trial, unless a copy of the petition has been served," unless waived by DHH.⁵

Lastly, if plaintiff's treatment has been paid for by an employer-sponsored health insurance plan governed by ERISA, the recovery rights of the insurance company/plan are statutorily limited.⁶ However, the plan/health insurer cannot be ignored. The plan may have rights to reimbursement against the participant, assuming the contract language so provides. Thus, it is important to be mindful of the plan's reimbursement language.

Why is it important to consider reimbursement rights of medical providers? Louisiana lawyers have the responsibility of reimbursing those parties, or risk disciplinary action. **Rule 1.15(b)** of the **Louisiana Rules of Professional Conduct**, the body of law which governs attorneys in their professional capacity, provides an attorney, upon receiving funds in which a third party has an interest, must notify, repay and, if requested, provide a full accounting to that third party. Thus, an attorney's failure to pay a medical provider who has incurred expenses on behalf of a settling plaintiff may subject that attorney to disciplinary action. This is, of course, in addition to the potential "double damage" recovery by Medicare.

Because many personal injury cases settle, it is imperative that attorneys, adjusters and the parties be aware of the rights of the entity that paid medical expenses on behalf of a plaintiff. Those rights could substantially affect the net outcome of a settlement.

¹42 U.S.C. §1395y(b).

²337 F.3d 489 (5th Cir. 2003).

³*Id.* at 503-05.

⁴See 42 U.S.C. §1395y(b)(2)(A).

⁵LSA-R.S. 46:9(B).

⁶See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002).



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Third Circuit Decides Commencement for Delays in Settlements Involving Minors

Under *LSA-R.S. 22:1220*, an insurer is liable for penalties if it fails to pay a settlement within thirty days after the agreement is reduced to writing. In *Guilbeau v. Ramsay*, 2004 WL 737082 (La. App. 3 Cir. 2004), the Third Circuit recently found when the settlement involves the compromise of a minor's claim, the thirty day period will commence when the order is signed authorizing the minor's tutor to compromise the claim.

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