

SYNERGY WHITE PAPER: Risks for Law Firms Related to Medicare Secondary Payer Compliance & Best Practices

By Jason D. Lazarus, J.D., LL.M., MSCC

What are the consequences to a law firm for inadequate compliance processes in representing a Medicare beneficiary? There are quite a few risks unfortunately. The most ominous though is government action against a personal injury law firm. As a starting point, the government takes Medicare Secondary Payer Act compliance seriously and is willing to pursue trial lawyers who ignore Medicare's interests.

Section I: Government Actions for Failing to Comply with the MSPA

The following are several examples of the government's legal actions against personal injury law firms. In August of 2020, a Harrisburg personal injury law firm agreed to pay \$53,295 to the United States government in order to resolve liability for non-repayment of a Medicare conditional payment. According to the U.S. Attorney who brought the case, the Angino Law Firm represented a Medicare beneficiary in a state medical malpractice claim against a pharmacy that allegedly dispensed an incorrect drug to the injury victim. As a result of the malpractice, Medicare conditionally paid over eighty-four thousand dollars for the Medicare beneficiary's medical care. The Angino Law Firm settled the medical malpractice claim and received the settlement monies from the defendant. The law firm refused to repay Medicare and the United States filed suit to recover the money. Ultimately, the matter was settled with the U.S. Attorney stating that "Medicare benefits are a vital lifeline for thousands of citizens in the Middle District of Pennsylvania." He went on to say that "[o]ur Affirmative Civil Enforcement Unit is focused on making sure that such funds are appropriately billed and spent, and recovered

when the situation requires. The health of our Medicare beneficiaries is far too important for our office to stand on the sidelines.”

In January of 2020, the United States Attorney William M. McSwain announced that “a Philadelphia-based personal injury law firm . . . entered into a settlement agreement with the United States to resolve allegations that it failed to reimburse the United States for certain Medicare payments.” As part of the settlement, like in other cases, the firm agreed to pay \$6,604.59 to satisfy the debt owed to Medicare. In addition, the firm agreed to “(1) name a person responsible for paying Medicare secondary payer debts; (2) train the employee to ensure that the firm pays these debts on a timely basis; (3) review any additional outstanding debts to ensure compliance; and (4) provide written certifications of compliance.” The firm also acknowledged that any future “failure to submit timely repayment of Medicare secondary payer debt may result in liability for the wrongful retention of a government overpayment under the False Claims Act.” The following quote from McSwain sums it all up: “Lawyers need to set a good example and follow the rules of the road for Medicare reimbursement. If they don’t, we will move aggressively to recover the money for taxpayers.”

In November of 2019, The United States Attorney for the District of Maryland announced that a Baltimore based law firm paid the United States \$91,406.98 to resolve allegations that it failed to pay back Medicare for conditional payments that had been paid on behalf of firm clients. The press release indicates that the firm had entered into a joint-representation agreement with co-counsel who in turn didn’t reimburse Medicare at settlement. According to U.S. Attorney Robert K. Hur, “Plaintiffs’ attorneys cannot refer a case to or enter into a joint representation agreement with co-counsel and simply wash their hands clean of their obligations to reimburse Medicare for its conditional payments.” He went on to say, “[w]e

intend to hold attorneys accountable for failing to make good on their obligations to repay Medicare for its conditional payments, regardless of whether they were the ones primarily handling the litigation for the plaintiff.” So, this is a warning to every attorney who might refer a case to another attorney: you can’t do so and avoid liability if Medicare compliance is ignored. The lesson is that when you refer a case to another firm you need to make sure you have 3 things: 1) A written fee agreement; 2) A copy of the lawyer’s malpractice insurance policy declarations; and 3) Proof that the lawyer has engaged a lien resolution firm or has a compliant process to resolve Medicare Conditional Payment obligations.

Similarly, in March of 2019, the United States Attorney for the District of Maryland announced that a Maryland personal injury law firm had agreed to pay the United States \$250,000 to settle claims that it did not reimburse Medicare for payments made on behalf of a firm client. As part of the settlement, the firm “also agreed to (1) designate a person at the firm responsible for paying Medicare secondary payer debts; (2) train the designated employee to ensure that the firm pays these debts on a timely basis; and (3) review any outstanding debts with the designated employee at least every six months to ensure compliance.” The liability arose due to reliance upon a conditional payment letter (CPL) instead of a final demand from Medicare. The CPL had an erroneously low amount identified as reimbursement to Medicare which the law firm relied upon in settling the case. Unfortunately, after appealing the matter and relief being denied the firm agreed to a settlement with Medicare. The press release stated that the “settlement should also remind attorneys not to disburse settlement proceeds until receipt of a final demand from Medicare to pay the outstanding debt.”

Lastly, in June of 2018, the U.S. Department of Justice announced a settlement with a Philadelphia Personal Injury Law Firm involving failure to reimburse Medicare. The firm

agreed to start a “compliance program” and the DOJ stated that this “settlement agreement should remind personal injury lawyers and others of their obligation to reimburse Medicare for conditional payments after receiving settlement or judgment proceeds for their clients.” The US Attorney’s office also stated, “When an attorney fails to reimburse Medicare, the United States can recover from the attorney—even if the attorney already transmitted the proceeds to the client. Congress enacted these rules to ensure timely repayment from responsible parties, and we intend to hold attorneys accountable for failing to make good on their obligations.”

KEY TAKEAWAY: The government takes reimbursement rights seriously and is prepared to take legal action against personal injury law firms that do not appropriately repay Medicare conditional payments. The foregoing section cites several instances where firms had to pay substantial amounts to resolve liabilities for such non-payment. These cases demonstrate that a firm's obligation to Medicare cannot be circumvented, even when the case is referred to another attorney. Non-compliance can lead to personal liability, damage claims, and malpractice risks. Consequently, it is crucial for law firms to develop systematic processes to identify Medicare beneficiaries in their practice and address potential issues. Education about these issues can help prevent them from turning into malpractice or liability problems.

Section 2: What are the best practices when it comes to the MSP?

Consequently, in today’s complicated regulatory landscape, a comprehensive plan for Medicare compliance has become vitally important to personal injury practices. Lawyers assisting Medicare beneficiaries are personally exposed to damages and malpractice risks daily when they handle or resolve cases for Medicare beneficiaries. The list of things to be concerned about is growing daily. The list includes things such as:

1. Not knowing what medical information/ICD codes are being reported by defendant insurers complying with Mandatory Insurer Reporting law¹ (MIR) created by MMSEA.²
2. Agreeing to onerous “Medicare Compliance” language that may be inapplicable or inaccurate, which binds the personal injury victim.
3. Failing to report and resolve conditional payment obligations leading to personal liability.
4. Not using processes to obtain money back from Medicare using the compromise and waiver process.
5. Failure to identify a lien, such as those asserted by Medicare Part C lien holders thereby exposing the personal injury lawyer and the firm to double damages.
6. Inadequate education of clients about Medicare compliance when it comes to futures and the risks of denial of future injury related care.

So, what do you do? The answer is to develop a process to identify those who are Medicare beneficiaries in your practice and make sure that process is put into place to deal with the myriad of issues that can arise. The first step is education about these various issues to lawyers and their staff so problems can be identified before they become a malpractice issue or worse yet, a personal liability for any attorney involved in the matter.

KEY TAKEAWAY: Navigating the intricacies of Medicare compliance in today's complex regulatory environment is of utmost importance for personal injury law firms.

¹ 42 U.S.C. § 1395y(b)(7)-(8)

² The MMSEA created a mandatory insurer reporting requirement which tasks defendants/insurers with reporting settlements involving Medicare beneficiaries to Medicare. The reporting requirement requires settlements of \$2,000 or greater to be reported as of 10/1/13. Medicare, Medicaid, and SCHIP Extension Act of 2007 (P.L. 110-173). This Act was passed by the House on December 19, 2007, and by a voice vote in the Senate on December 18, 2007

Failure to do so exposes lawyers to significant damages, malpractice risks, and personal liability. Concerns range from lack of understanding of the medical information reported by defendant insurers, to agreeing to complex “Medicare Compliance” language, failure to resolve conditional payment obligations, and even overlooking lien obligations. The best strategy to manage these risks is to implement a well-thought-out process to identify Medicare beneficiaries and address these concerns proactively within your law practice.

Conclusion

In conclusion, the government is very serious about and intent on enforcing the Medicare Secondary Payer Act. Failure by a lawyer to take appropriate actions with regard to the MSP exposes that lawyer and his firm to potential enforcement actions by the government. But that is just one of the many risks for law firms in terms of navigating the Medicare Secondary Payer Act.

SYNERGY MSP COMPLIANCE PRACTICE TIP:

Understand the mistakes made by other law firms in relation to the MSPA. Don't ever ignore Medicare repayment obligations. Never disburse settlement proceeds until receipt of a final demand from Medicare; conditional payment letters do not bind Medicare. If you refer a case involving a Medicare beneficiary to another law firm, you remain liable so make sure that the firm you referred the matter to reimburses Medicare. As the settlements outlined in this chapter recommend, it is best practices to: “(1) name a person responsible for paying Medicare secondary payer debts [within the firm]; (2) train the employee to ensure that the firm pays these debts on a timely basis; (3) review any additional outstanding debts to ensure compliance.”