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SMART Act

A Ray of Hope on Medicare Lien Issues

By Ken W. Harrell and Melissa A. Fried

Civil rights activist Fannie Lou Hamer's tombstone is engraved with her most famous quote, "I'm sick and tired of being sick and tired." Personal injury attorneys and clients who have wrestled with Medicare on lien issues over the past few decades have often felt the same way. Many attorneys have had to answer to clients who could not understand why it took several months, and sometimes years, to receive any net proceeds from their personal injury settlement. Attorneys have had to explain to their clients that they could not get a definitive answer from Medicare on a lien amount, especially in situations where a significant reduction was being sought on a hardship basis. Reportedly, some attorneys have grown so frustrated with Medicare that they have stopped accepting cases for clients who have Medicare coverage, just as some private medical practices refuse to accept patients covered by Medicare.

The Medicare Secondary Payment Act has caused much confusion and many headaches for attorneys and beneficiaries over the years. When representing a Medicare beneficiary, attorneys have always had to consider whether Medicare has asserted a lien against their clients; however, unlike other health insurance liens, there was no reliable means of determining Medicare's lien amount until after the client's claim was resolved. Additionally, it took an interminably long time to receive a lien figure from Medicare. Calling Medicare directly and sitting on hold for an hour or more was commonplace.

In an effort to alleviate much of the delay and confusion, President Obama signed into law the Strengthening Medicare and Repaying Taxpayers Act, more commonly referred to as the SMART Act, on January 1, 2013.[1] Mary Alice McLarty, president of the American Association for Justice (AAJ), described the SMART Act as "a practical solution that will streamline the Medicare Secondary Payer [(MSP)] system to ensure that seniors and persons with disabilities get timely assistance and taxpayers are repaid millions of dollars every year."[2] For attorneys representing Medicare beneficiaries, this summary probably sounds too good to be true. While time will tell whether that is the case, the SMART Act appears to be a step in the right direction. The SMART Act sets forth six improvements to the current Medicare system, all of which are outlined below.

The SMART Act's creation of the Medicare web portal

One of the highlights of the SMART Act is the creation of a website to process claim information, and, specifically, to help attorneys and claimants determine the final conditional payment amount *prior* to settlement.

According to Sec. 201 of the SMART Act, the Secretary of Health and Human Services (HHS) must allow individuals to access information on claims that relate to a potential settlement, judgment, award or other payment. Attorneys must first obtain their client's consent before accessing information on the web portal. Medicare is directed to update information on claims and payments on the Medicare portal no later than 15 days after a payment is made on behalf of a Medicare recipient. The SMART Act sets forth the type of information that is available to those who have access to the web portal

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such as provider or supplier names, diagnosis codes, dates of services, and conditional payment amounts. However, as of late September 2013, the only information being shown is the conditional lien amount and the final demand amount.

The SMART Act also establishes procedures and timing for both claimants and Medicare to post information to the web portal. First, interested parties "may at any time beginning 120 days before the reasonably expected date of a settlement, judgment, award, or other payment, notify the Secretary that a payment is reasonably expected and the expected date of such payment."[3] Once notice is sent by interested parties, this begins what the SMART Act refers to as the "protected period."[4] The protected period gives Medicare 65 days to provide interested parties with a final conditional payment amount. However, Medicare may extend this protected period for an additional 30 days "if the Secretary determines that additional time is required to address claims for which payment has been made."[5]

What does all of this mean in plain English? Shawn Davis, a litigation paralegal for the Joye Law Firm for more than 10 years, recently conducted an in-house seminar for all of the firm's attorneys and paralegals on the new portal. When asked how the new portal was working, Ms. Davis stated:

> It's not perfect but it's a huge improvement over what we used to have to deal with on these liens. A lot of the guess-work about what Medicare had paid for is gone now because they're doing a pretty good job of keeping the information timely. There are still mistakes made with unrelated medical costs being posted as being due to the accident injuries, but the portal allows you to challenge these charges and so far, Medicare has been responsive when we've done that. My advice to paralegals is to get on the new portal and work with it. With time, hopefully, it will get even more efficient. It sure beats sitting on the phone for an hour listening to Muzak.

Presently, plaintiff's counsel sends a signed Medicare Consent to Release form to the agency to set up a claim. Within 65 days, Medicare sends their beneficiary and the attorney a letter providing a case identification number. This identification number and the client's social security number are used to access the portal. To register to use the portal, go to www.cob.cms.hhs.gov/MSPRP. Once registered, the user may utilize this same site to request case access for a client's file.

The SMART Act also prevents Medicare from revising the final lien amount after a specific time. If a settlement or final judgment is made during the protected period, the last reimbursement amount downloaded by the interested party within three business days before the date of settlement, judgment or award "shall constitute the final conditional [reimbursement] amount subject to recovery …"[6] This will allow attorneys to "lock in" the final lien amount prior to settlement.

Additionally, the SMART Act sets forth criteria for challenging claimed reimbursement amounts. However,

the SMART Act leaves it up to Medicare to "provide a timely process to resolve the discrepancy."[7] A plaintiff's attorney who disputes Medicare's claimed amount must provide documentation explaining the basis for the dispute and a proposal as to how to resolve it. Once Medicare receives the documentation, it has 11 business days to agree or disagree with the dispute raised. If Medicare fails to make this determination within the 11-day period, then, according to the SMART Act, the beneficiary's dispute must be accepted as made.[8] However, if Medicare timely disagrees that a discrepancy exists, then it must agree to the attorney's proposal to resolve it or provide documentation for an alternate resolution within "a timely manner."[9] Medicare's definition of what constitutes a "timely manner" is certainly concerning given the agency's past track record. If Medicare concludes there is not a reasonable basis to remove claims on the statement of reimbursement, then the proposal is simply rejected.[10] For further explanation and illustration of this process, see Diagram 1.

The SMART Act provides that Medicare had nine months from the date of the law's enactment to issue regulations to comply with these portal time requirements. This deadline was October 10, 2013.[11]

The SMART Act allows more privacy for Medicare beneficiaries.

In an era of identity fraud and credit protection, it is inevitable that the SMART Act would follow suit by taking proper precautions to protect a beneficiary's confidential information. To ensure the security of its beneficiaries, Section 204 of the SMART Act states that social security numbers and health identification claim numbers will eventually not be needed for reporting purposes. The SMART Act states that this elimination must take place within 18 months of the legislation being enacted.[12]

The SMART Act provides a three-year statute of limitations for Medicare to collect repayments.

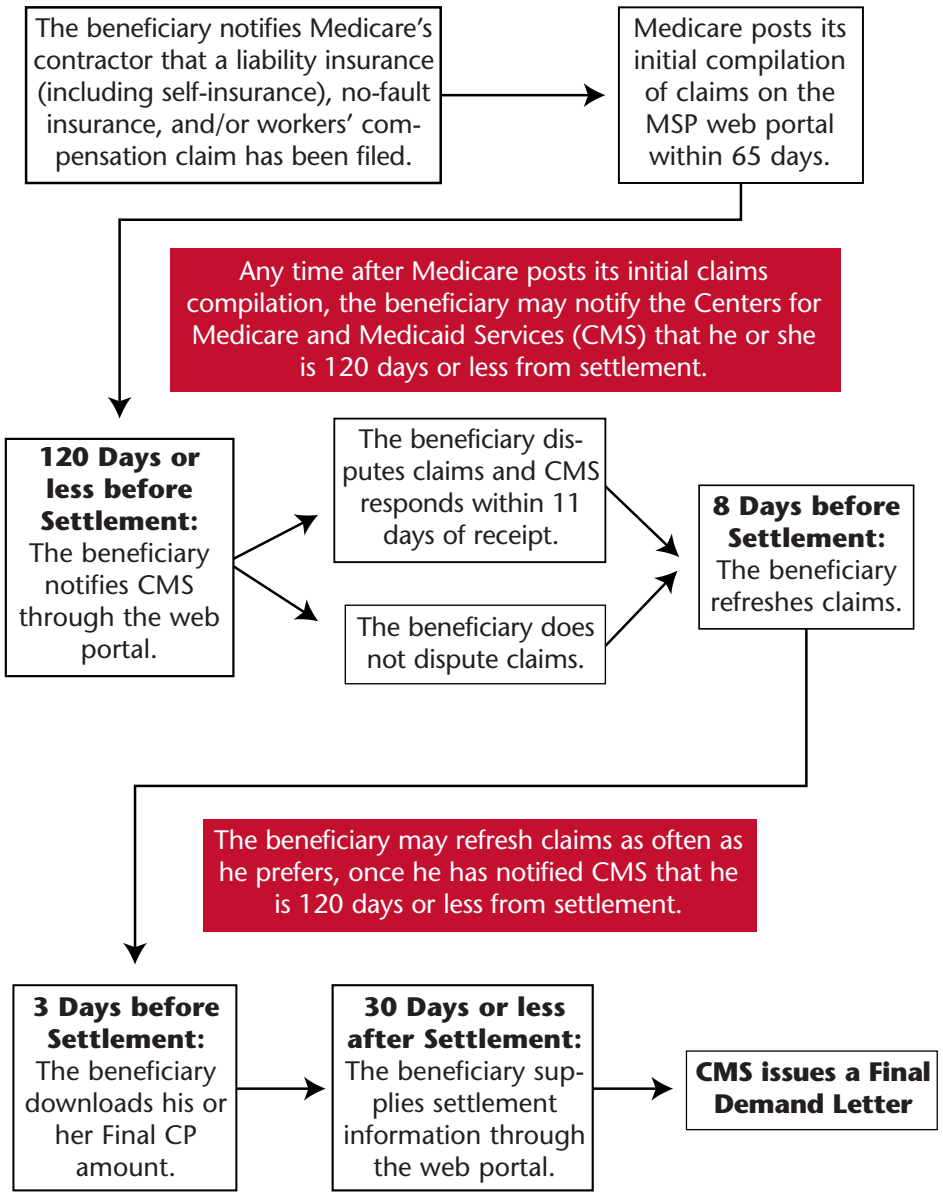
The SMART Act allows only three years for government actions to recover conditional payments. "An action may not be brought by the United States under this clause with respect to payment owed unless the complaint is filed not later than 3 years after the date of the receipt of notice of a settlement, judgment, award, or other payment. …"[13] The new statute of limitations applies to actions brought on or after July 10, 2013.[14] This provision is beneficial for attorneys as it allows them to close their case rather than keeping it open, concerned about liability to Medicare long after the claim has concluded.

Many attorneys receive letters today from Medicare inquiring about the terms of settlements reached years ago. While many of these letters are more focused on the existence of a Medicare set-aside account in a workers' compensation case rather than a conditional payments lien, having a statute of limitations in place will force Medicare to be more efficient on lien resolutions, and it will give attorneys and clients more peace of mind.

The SMART Act establishes a minimum threshold for collection of payment.

Additionally, the SMART Act establishes that beginning on November 15, 2014, Medicare must publish a single monetary compliance threshold for liability claims.[15] Medicare will not seek reimbursement on any case where the judgment or settlement amount is below

Diagram 1



this low-dollar threshold. The establishment of a monetary threshold is to prevent Medicare from seeking reimbursement for a claim that may cost Medicare more time and expense pursuing than the actual value of the claim. This threshold will be revised on November 15 of each year following the initial date of November 15, 2014.[16]

This low-dollar threshold applies to conditional payments that have been made before settlement, and it does not involve the complex issue of whether Medicare's interests in liability cases have to be considered for future medical costs. As any workers' compensation practitioner knows, workers' compensation settlements for an injured worker who is a current Medicare beneficiary or who has a "reasonable expectation" of becoming a beneficiary within 30 months have to include a Medicare set-aside (MSA) component if the claimant's future medical coverage rights are released. It is often mistakenly presumed that there are workers' compensation settlement amount thresholds of $25,000 for a current beneficiary and $250,000 for someone in the "reasonable expectation" category to trigger the MSA requirement. These amounts actually represent workload review thresholds for Medicare, as the agency will not review and approve settlements below these amounts; it does not mean, however, that workers' compensation settlements below these figures do not require an MSA.

Currently, there is a lot of gray area surrounding what consideration must be given to potential future medical costs for a Medicare beneficiary who receives a liability settlement for personal injuries. The AAJ and several state trial attorney organizations have filed objections to Medicare asserting any interest in future medical costs in a liability settlement because these settlements differ greatly from a workers' compensation settlement. First, workers' compensation laws generally provide for ongoing medical coverage for a worker's injuries while liability defendants have no such obligation. Second, the allocation of a workers' compensation settlement is largely dictated by limitations on what an injured worker can recover, while liability settlements include amounts for intangible damages such as pain and suffering. Despite these objections, Medicare is expected to issue proposed rules before the end of 2013 on how it intends to pursue any recovery related to a liability claimant's future medical rights. Those rules will not only have a significant impact on the handling of liability claims for clients that are Medicare recipients, they will also greatly increase the need of legal representation for those individuals that have not yet hired an attorney.

The SMART Act creates new penalties for reporting errors.

Prior to the SMART Act, interested parties would incur a mandatory penalty of $1,000 per day for failing to comply with the reporting requirements. Now, the SMART Act has lessened the blow of this penal-

ty by changing the language from "shall be subject" to "may be subject to a civil money penalty of up to $1,000 for each day of noncompliance with respect to each claimant."[17]

The SMART Act lays the groundwork for a right to appeal.

Interested parties have the right to appeal a determination of conditional payments under the SMART Act. However, the SMART Act does not outline the appeals procedure and, instead, simply states, "[t]he Secretary shall promulgate regulations establishing a right of appeal and appeals process, with respect to any determination under this subsection for a payment made under this title for an item or service for which the Secretary is seeking to recover conditional payments from an applicable plan. …"[18] According to this section, the right to appeal applies to an attorney, agent or third party administrator.[19] Unfortunately, there is no deadline for Medicare to create the appellate process, but the inclusion of this section allows attorneys and claimants to hope that there will be a means of appellate review in the near future.

Conclusion

Every profession has its own unique set of challenges. For trial attorneys handling personal injury claims, dealing with Medicare on lien issues has been difficult at times. Fortunately, the improvements made pursuant to the SMART Act's implementation provide some relief for attorneys and their clients in these cases. Unfortunately, just as relief has arrived for resolving conditional payment liens, Medicare may soon be opening Pandora's Box by asserting lien interests for future medical costs in liability cases. We'll have to stay tuned on that issue.[20]

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Endnotes

[1] Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012, Pub. L. No. 112-242, 126 Stat. 2374 (Jan. 10, 2013), www.gpo.gov/fdsys/pkg/PLAW-112publ242/pdf/PLAW-112publ242.pdf (hereinafter "SMART Act").
[2] *AAJ Response on House Passage of the SMART ACT*, www. Justice.org (Dec. 20, 2012), http://www.justice.org/cps/rde/justice/hs.xsl/19942.htm.
[3] SMART Act, Sec. 201 (vii)(I).
[4] SMART Act, Sec. 201 (vii)(V).
[5] *Id.*
[6] SMART Act, Sec. 201 (vii)(III).
[7] SMART Act, Sec. 201 (vii)(IV).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] SMART Act, Sec. 201(vii)(VI).
[12] SMART Act, Sec. 204.
[13] SMART Act, Sec. 205(a).
[14] SMART Act, Sec. 205(b).
[15] SMART Act, Sec. 202(a)(2).
[16] SMART Act, Sec. 202(a)(2).
[17] SMART Act, Sec. 203 (1).
[18] SMART Act, Sec. 201(viii).
[19] *Id.*
[20] For more information on the recovery process for Medicare claims, please see www.msprc.info. For information on the MSP system, please see www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Medicare-Secondary-Payer/Medicare-Secondary-Payer.html.