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Addressing Medicare liens in wrongful-death cases

KEEP CMS FROM EATING UP YOUR WRONGFUL-DEATH SETTLEMENT BY STEERING CLEAR OF MEDICAL EXPENSE CLAIMS

Subtle missteps in a wrongful-death claim can subject your client's entire recovery to a Medicare-reimbursement demand. Counsel are often surprised to learn that Medicare may try to hold a wrongful-death claimant responsible for reimbursement of the decedent's medical expenses. This result seems counterintuitive because, in California, a wrongful-death claim ("WD") belongs to the heirs, *not* the decedent. (Code Civ. Proc., § 377.60.) This is to be distinguished from a survival cause of action for the decedent. Medicare will generally adhere to the manner in which state law limits wrongful-death damages. (Medicare Secondary Payer Manual (Chapter 50.5.4.1.1).)

Unfortunately, some common, seemingly innocuous claims and litigation practices can expose wrongful-death claimants to Medicare liens for the decedent's healthcare expenses. The root of this problem stems from a broadly worded paragraph in the Medicare Secondary Payer Act ("MPSA"). Section 1862 (b)(2)(B) (ii) of the MPSA, 42 U.S.C. § 1395y(b)(2)(A)(ii), delineates the elements of when an *entity* must reimburse the Medicare program for medical expenses. Section 1862 (b)(2)(B)(ii) states in pertinent part:

... [A] primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this title with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

Basically, the Center for Medicare Services (CMS) will seek reimbursement from any recovery which arguably relates, to any extent, to a release of the decedent's medical expenses, regardless of whether the decedent's medical bills are part of the claim. Counsel often make wide-ranging claims for damages in demands, pleadings, or discovery responses. Doing so in a wrongful-death case can blur the limitations on wrongful-death damages and give the appearance of having leveraged the value of the decedent's medical expenses in pursuit of the WD recovery.

Where there is even a question the decedent's medical bills were included in a WD claim, Medicare will seek reimbursement. (See, e.g., *Benson v. Sebelius* (D.C. 2011) 771 F. Supp.2d 68, 76 (*Benson*) [absent any evidence plaintiff eliminated/excluded medical expenses in his underlying wrongful-death settlement, court declines to find error in Medicare Appeals Board allowing CMS reimbursement for full cost of decedent's medical treatment].)



The Big Three questions

Accordingly, care should be taken from initial client intake forward to clearly document that the WD claimants neither claim nor release the decedent's past medical damages. Throughout the handling of a wrongful-death claim, counsel should routinely revisit three questions:

1. Has counsel asserted any claim that allows for recovery of the decedent's medical expenses?
2. Did the wrongful-death claimants refer to the decedent's medical expenses at any point?
3. Did the wrongful-death claimant release the decedent's medical expenses, including arguably by way of a vague general release?

To avoid Medicare reimbursement mistakes, a wrongful-death case file should demonstrate a clear "no" to each of the above questions. A simple three-part test sounds like an easy path to follow, but practitioners can quickly lose their way in the inevitable haze of real-world complications.

One common cause of confusion relates to inadvertently interweaving wrongful-death and survival claims. For wrongful-death claims, standing rests in the decedent's heirs, such as the surviving spouse, domestic partner and/or children. Code of Civil Procedure section 377.60 defines wrongful death as a fatality caused by someone else's wrong act or neglect. Wrongful-death claimants are entitled to recover lost financial support and the *pecuniary value* of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support. (See CACI No. 3921.) Thus, wrongful-death claims are personal to each wrongful-death

claimant and notably exclude the defendant's special damages incurred after the wrongful act and before death.

In contrast, a survival claim is the property of the decedent's estate. In many instances the decedent does not pass immediately, often incurring substantial medical care and related costs before death. Code of Civil Procedure section 377.30 authorizes the decedent's personal representative or, if none, the decedent's successor, to commence an action on behalf of the estate to recover the economic loss incurred before death. However, the decedent's general damages are not recoverable. (Code Civ. Proc., § 377.34.)

Practitioners must recognize that wrongful-death and survival claims are brought by different plaintiffs seeking different damages against the same defendants.

When a liable defendant has insurance policy limits and insufficient assets to fully compensate all potential claims, the decedent's estate will be competing with the wrongful-death claimants for the same pool of funds, thus creating a financial conflict of interest. Conflicts and overlapping claims are more difficult to manage in the common situation where a wrongful-death claimant, such as the surviving spouse, has dual capacities as both a wrongful-death heir and as representative of the estate.

The parties' conflicting interests will extend into the Medicare reimbursement issues. Frequently, the value of a survival claim is based solely on the decedent's medical expenses. Except in rare cases, economic losses for lost future earnings inure to the benefit of wrongful-death claimants and are not part of the estate. Punitive damages require some expenditure by the deceased before death; infrequently the estate is formed for that purpose. In cases where the decedent's medical expenses were covered by Medicare, Medicare's reimbursement may absorb the estate's entire recovery.

Fiduciary-duty problems

When counsel for the estate or wrongful-death claimant fails to warn their clients that Medicare could take the entire net recovery, counsel has walked into fiduciary-duty problems. Counsel could create the appearance of impropriety by having engaged in deceptive or self-interested conduct when they keep a fee and Medicare receives reimbursement but the estate or wrongful-death client does not retain reasonably adequate compensation. It is hard to see how *pursuing* a claim with such a result is in the interests of the clients.

Counsel should note that Medicare reduces its lien in proportion to "procurement costs," i.e., the actual attorney's fees and costs incurred in obtaining the recovery by the beneficiary. This is not necessarily the same as the amount of fees or costs the beneficiary is contractually obligated to pay counsel under a bona fide fee agreement.

Counsel should avoid using the procurement-cost reduction as a way of increasing the client's net recovery, such as by letting the client keep a portion of the reduced "procurement costs." If counsel misleads Medicare as to the actual fees and costs paid by the client, thereby paying Medicare less than is legally required, counsel may have committed fraud. Moreover, this could implicate violations of the California Rules of Professional Conduct, such as Rules 3.3 (duty of candor to the tribunal) and 4.1 (false statements of material fact to a third person).

You are on solid ground with CMS if you can unequivocally demonstrate that you only represent the wrongful-death claimants, and the claimed damages do not include the decedent's medical expenses. If no claim is made on behalf of the estate, and there is no reference to the decedent's medical damages, then it is abundantly clear that no past medical special damages have been claimed, and, in turn, Medicare has no basis for seeking reimbursement. (*Bradley v. Sebelius* (11th Cir. 2010) 621 F.3d 1330.)

Be alert for these issues during the pendency of a bodily injury claim, and particularly in instances where the plaintiff has died from his injuries or trauma, and counsel represents family members in a (ripe) wrongful-death claim.

Since the rights of wrongful-death heirs at law come into fruition upon death, a new and proper fee agreement is necessary to pursue that specific claim by proper heirs. The decedent is possessed of a survival cause of action in many instances. This implicates the formation of an estate and appointment of an administrator. Separate retainer agreements are recommended as between wrongful-death claimants and the administrator for the estate's survival action.

In any instance where the bodily injury client has passed and a wrongful-death claim is contemplated, counsel would be well advised to send a new letter of representation identifying clients in distinguishing the deceased's estate. Where no estate will be formed or no survival action is contemplated by the estate, counsel should withdraw the personal-injury claim (that is essentially extinguished) on account of the death, providing the death certificate if convenient, thereby closing the claim numbers.

Do not claim decedent's past medical special damages

In a wrongful-death claim, do not copy and paste blanket demands for damages – not even as a demonstration of how significant the event was or how heroic the physicians and health care providers were. If past medical costs of the decedent are referenced in a demand, complaint, discovery response, or other aspects of a case, CMS will assume that the claimant demanded and resolved a claim for medical damages. CMS will accordingly seek full reimbursement of its related medical expenses. (*Benson, supra*, 771 F.Supp.2d at p. 73-74.)

If the wrongful-death claimant avoids referencing the decedent's past medical

special damages, then the wrongful-death recovery will be safely separated from Medicare's claim to the decedent's past medical expenses – as long as counsel properly drafts the release.

The terms of the settlement document have real meaning and effect

Medicare reimbursement confusion (and worse) can be avoided if the settlement documents resolving a WD claim plainly and conspicuously articulate the release only applies to WD claims and corresponding damages.

Limiting the scope of a release can be challenging. Even when settlement documents state that the recovery is for wrongful death, if the release includes omnibus language about the decedent's past medical expenses, the recovery can be seen to include the estate's claims and thus invoke CMS's lien rights. This is especially true if the release is signed by a wrongful-death heir who is also the legal representative of the estate, and the capacity of the *releasee* is not made clear. (See *Taransky v. Sec. of US Dept. of Health & Human Servs.* (3d Cir. 2014) 760 F.3d 307.)

Defense counsel will want a full resolution of "any and all" potential claims against the defendant. Defense counsel will be unlikely to settle WD claims if the survival claim of the estate is left unresolved, especially when the liability carrier is tendering its policy limit.

Multiple options for segregating estate and wrongful-death recoveries

Think like a trial lawyer. Can the statute of limitations be brought into play to delimit the claims? Potentially. If the two-year SOL is approaching (Code Civ. Proc., § 335.1), filing an action for wrongful death without the estate's claims should extinguish any remaining doubts about resolving the wrongful-death claim by itself.

If both wrongful-death and survival claims are pending in litigation, dismissal of the estate's claims with prejudice can achieve the same result. However, you

must prepare the appropriate documentation to satisfy the probate court supervising the estate (read special administrator), and not take precipitous action that may injure the rights of parties interested in the estate. That is beyond scope here.

If no statute of limitations is in play, consideration can be given to formally releasing the estate's claims against the defendant. If the estate's claim is in litigation, the claim could be released in exchange for a waiver of costs. Memorialize such a settlement in a separate release. A liability carrier can then proceed to resolve the wrongful-death claims without fear of leaving the estate's claim open as a lingering exposure to their insureds.

When resolving a survival claim, the estate plaintiff should put CMS on notice of the proposed resolution of their survival claims and allow a reasonable time for CMS to intervene or otherwise object. We have never seen CMS appear. The legal effect of such notice is untested; however, it does seem relevant to an effort to act "reasonably" to protect Medicare's interests.

Again, the crux of the Medicare issue is whether the WD recovery can be construed to include the decedent's medical expenses. By separating the resolution of survival claim from WD claims, counsel can more easily demonstrate the mechanics behind resolving the claims and the parties' good faith. It will be apparent that the survival claim was waived because it would not have provided any benefit to the estate – especially where all recovered funds would be used to reimburse Medicare and pay counsel. Additionally, separate resolutions can demonstrate that the wrongful-death claims were effectively held hostage while the carrier refused to settle without also resolving the estate claims.

Beware of creating third-party beneficiary rights in favor of CMS

While it is standard for settlement documents to include language obligating

the plaintiff to indemnify and/or hold harmless defendants as to Medicare's claimed interest, such language can create post-settlement problems for the plaintiff/claimants. We increasingly see language which arguably creates third-party beneficiary rights in favor of Medicare against the plaintiff, to the effect that the plaintiff has contractually agreed as part of the settlement to reimbursement to Medicare.

This concern is particularly acute in the context of a wrongful-death claim where the parties claim Medicare has no statutory right to a lien against the recovery, and thus no right to pursue the liability carrier as a primary payer. The last thing the parties should do is create (ambiguous) contract rights in favor of CMS in the settlement documents. Language such as that below can help deal with this issue:

Nothing in the release shall inure to the benefit of any non-party to this release, named or unnamed, including any governmental or insuring entity. No third-party beneficiary status/standing is established or implied for any such individual or entity.

Ensure that the liability carrier properly reports the settlement to CMS

Under the Medicare and Medicaid SCHIP Extension Act of 2007 (MMSEA) liability carriers must report settlements to Medicare. It is important that the carrier accurately reports that it paid a wrongful-death claim, and not a survival claim that could include the decedent's medical expenses.

If at some point a Medicare reimbursement claim has been opened by a claimant's counsel or the liability carrier, based on the decedent's beneficiary status, both the estate and the liability carrier should report to CMS that this claim resolved with no payment to the estate.

The wrongful-death claims, and the payment resolving these claims, should be reported by the liability carrier to CMS as payments to *the individual*

claimants – heirs at law – collectively. The carrier should be clear that the payment does not include payment for the decedent's damages.

CMS recently included a default ICD-10 diagnostic code, "NOINJ," that could be used by carriers or other reporting entities when a settlement/payment releases claims for "medical," but the "type of alleged incident typically has no associated medical care." The "NOINJ" code would seem to be applicable in wrongful-death settlements in which the claim cannot include the decedent's past medical expenses, as a matter of law, and the wrongful-death claimants do not have any related medical care.

Proper Medicare reporting is more important when a claim starts out as a personal-injury claim and is converted to a wrongful-death claim with the passing of the plaintiff. There is a risk of CMS confusing the two claims, because the liability carrier most likely opened a personal-injury case with CMS before the wrongful-death claim arose. If the subsequent wrongful-death claim is reported under the same CMS case number as the personal-injury claim, this is likely to trigger a reimbursement demand by CMS. In turn, this may set off months, or even years, of wrangling with CMS to set the record straight. Lay a smoother path from the outset by taking steps to ensure that all parties provide accurate reporting to CMS.

A back door when the situation is dire

We often see circumstances in which the parties and their lawyers and insurers simply fail to consider that Medicare would assert a lien against a settlement. Such an oversight typically results in the plaintiff receiving a Medicare reimbursement demand long after the case resolved, and after the funds were disbursed. When the situation is dire, there is a potential back-door remedy to unwind the settlement – invoking the mutual-mistake doctrine. If the parties could thereby unwind the settlement, there may be nothing for CMS to assert a lien against. (See *Osterbye v. United States* (No. 19-17349, D.N.J. June 30, 2020) 2020 U.S. Dist. LEXIS 116591.)

What about Medicaid reimbursement?

Unlike Medicare reimbursement, Medicaid reimbursement is straightforward with regard to wrongful-death issues. California's Medicaid program, Medi-Cal, is handled by the California Department of Health Care Services. The California Supreme Court has provided us with the following succinct guidance on Medi-Cal liens against wrongful-death cases:

May a Medi-Cal lien for costs incurred in treating a decedent's final illness be asserted against a recovery in a wrongful-death action when that recovery does not and could not include those medical expenses? The answer is "no."

(*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 816.)

Due to the categorical pronouncement of the California Supreme Court, practitioners are unlikely to encounter a problem with Medi-Cal seeking reimbursement from a wrongful-death recovery – if the wrongful-death recovery is demonstrably separate from any potential survival claim.

Conclusion

When handling a wrongful-death claim, care needs to be taken to ensure all parties act reasonably to protect Medicare's potential interest. This requires plaintiff's counsel to fully advise their clients on the interaction between survival and wrongful-death claims. Be alert for conflicts and deal with them appropriately.

When wrongful-death claims resolve, being proactive to ensure the settlement is properly reported to CMS by all parties is an indispensable step toward avoiding a prolonged battle with CMS over reimbursement demands.

John is the principal in The Lien Project, focused on helping plaintiffs' attorneys and their clients resolve medical liens and reimbursement issues in their personal-injury cases throughout California. John is also an active trial lawyer representing plaintiffs in personal-injury matters. He can be reached at john@theliensproject.com or through theliensproject.com.