

MSP debate still heating up

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It's a law that's been on the books just shy of 30 years, but is still being hotly discussed and interpreted in jurisdictions across the country.

"This is not a new law, but it is a law that's been honored in the breach, largely, since 12/5/80," says the federal prosecutor in Buffalo who oversees enforcement of this one provision of the Social Security Act.

But the Medicare Secondary Payer (MSP) statute has caught the attention - and the tongues and the pens - of the Western New York bar to an unusual extent.

This area of federal recovery has become "radioactive" over the last decade, says one plaintiffs' personal-injury lawyer. A cadre of Buffalo lawyers has been debating fine points of the MSP statute and case law - and what they mean for plaintiffs, insurers, physicians and the U.S. government - in seminar presentations, white papers, blog postings and published articles and letters (some of which have appeared in the Buffalo Law Journal).

The conversation has not yet become a legal showdown, but it's heating up into something approaching an Old-West duel. And the two lawyers with their hands moving toward their holsters are Assistant U.S. Attorney Robert Trusiak and trial lawyer J. Michael Hayes.

Opposing counsel

Trusiak and Hayes are both intellectually gifted, skilled persuaders.

Trusiak, who favors pin stripes, pocket squares and cufflinks, says his mission is one of education, alerting lawyers and their clients as to how they should be handling these claims, and what the penalties will be for not following that prescribed course.

And Hayes, a fearless, steely-eyed challenger, is willing to suggest that the legal system overhaul itself before it asks him to compromise his advocacy for his clients.

Hayes has no illusions about how far out he's sticking his neck out.

What they say

Trusiak, who's chief of the Affirmative Civil Enforcement Unit of the U.S. Attorney's Office for the Western District of New York, says the issue is as simple as this: If your client received

Medicare benefits and if Medicare paid for those medical expenses, you need to pay the agency back following a tort resolution.

And he's quick to note that a state court cannot declare Medicare's interest invalid.

There are steps prescribed by the MSP statute for how insurers and plaintiffs have to communicate with the Centers for Medicare & Medicaid Services (CMS) and meet the agency's demands for repayment following a settlement.

The penalties for not following those steps are stiff: \$1,000 a day for each claim, and the possibility that the government will be awarded double damages - in Trusiak's words, a potential for "ruinous financial exposure" for attorneys and clients alike.

Not so fast, says Hayes. He says that approach forces the plaintiff's attorney to represent not only the interests of a client, but also of the federal government.

Rule 1.8(g) of the New York Rules of Professional Conduct, he says, states that it would be "unethical for an attorney to represent competing claimants for a single pool of money, collect that pool, divide and allocate it between those two claimants, and then take a fee on the whole thing.

"You can't do it," Hayes says. "It's unethical."

He has suggested that plaintiffs' attorneys avoid this conflict by suing only for pain and suffering in tort cases, leaving Medicare or other entities to pursue recovery for medical expenses if they wish.

The point is moot, Trusiak says. The law says CMS must be given the opportunity to decide what share, if any, it's entitled to from a tort settlement, he says. The agency's MSP manual indicates, he says, "that any perceived limitation based on pain and suffering or otherwise is not (necessarily) an impediment to MSP recovery."

Defense attorney Michael Perley says he's not convinced by Hayes' argument.

"I don't think it's a conflict of interest, I think it's just a fact of life," says the Hurwitz & Fine lawyer.

The idea of limiting exposure by suing only for pain and suffering in a tort action, he said, doesn't apply in the Medicare arena.

"I don't think the law is going to be on his side of this argument," he says of Hayes.

Even if Hayes is right about the conflict issue, says a partner in a new Buffalo Medicare-claims consultancy, Franco Signor LLC, defendants won't sign on to that approach.

"The defendant is going to want to make sure that the entire process is resolved so that they don't have to have two cases related to this one transaction of events," says Roy Franco, who is admitted to the bar in California and Hawaii. "They want to make one payment and receive a settlement for it."

An appealing option

Hayes recognizes that it would take legislative or judicial intervention to address the perceived conflict of interest.

But he says he'll go the distance to get his argument heard. He's appealing a CMS decision on behalf of a client who won a medical-malpractice settlement. He declined to name the plaintiff or reveal the settlement amount.

"It'll go up to the district court and it will go up as high as necessary until they say that I must violate the disciplinary rules in the State of New York," he says.

He has also appealed rulings on severance motions - they seek to isolate pain-and-suffering allotments from medical and wage recovery - in two Workers' Compensation cases: Traska vs. Allied Storage and Robinson v. National Vacuum. Both cases will be argued before the state Appellate Division in Rochester in September.

In the meantime, Hayes says as far as he is aware, Western New York plaintiffs' lawyers are following the administrative processes they're supposed to in responding to MSP recovery claims - and that his clients are paying what's required "in accordance with the regulations."

What's at stake

Trusiak cites a CMS document that says these provisions save Medicare half a billion dollars every year.

"We're also talking about the continued integrity of the Medicare trust fund," he says, noting a reality that underpins the whole debate.

Franco believes no one's being shortchanged more than Medicare beneficiaries.

"They're getting caught in the middle of the plaintiffs' bar, the defense bar, insurance carriers, self-insureds - some pretty powerful groups," he says.

Medicare issues have to be considered in every single personal-injury case, says Perley. He estimates that recovery issues come up in 30-40 percent of all personal-injury cases.

"You can either pretend it's not there," he said, "freak out or take the time to figure it out."

Bill proposes changes to MSP statute

Rep. Patrick Murphy, D-Pa., and Rep. Tim Murphy, R-Pa., introduced the Medicare Secondary Payer Enhancement Act of 2010 (HR 4796) March 9. The bill is now in committee.

Roy Franco, a principal of a new Medicare-claims consultancy in Buffalo, Franco Signor LLC, says the proposals include key provisions that would:

- Clarify legislation to establish a limitations period of three years
- Protect the privacy of plaintiffs' Social Security numbers, which insurance carriers and self-insureds are now required to report when they report payments electronically
- Establish a clear administrative appeal process
- Expedite submission of conditional payments to the government - "putting the power back in the hands of the parties to do it as opposed to waiting on the government for information," says Franco.
- Add flexibility to penalty regulations so that parties may not be assessed the full penalty when they make a "good faith" error

Franco, who used to work in risk management for Safeway Inc. and is co-chair of the Medicare Advocacy Recovery Coalition, says the legislation has legs, largely because it takes into consideration concerns from a broad base of stakeholders, including the U.S. Chamber of Commerce, the American Association for Justice, DRI (formerly the Defense Research Institute), the National Structured Settlement Trade Association and the Medicare Rights Center.

"I believe we have quite a bit of support mounting," he says.

A law that takes effect Oct. 1, Franco notes, will require defendants to report payments made to plaintiffs to the government.

"You're under a constant obligation to know whether you're dealing with a Medicare beneficiary," he says. "Either from a plaintiff's or the defense side, you really need to start sorting out what your liabilities are with regard to the Medicare beneficiary and Medicare itself." MSP watchers are also closely watching *U.S. v. Stricker et al.*, a case filed in the Northern District of Alabama December 2009 that seeks to recover MSP payments from 907 Medicare beneficiaries who settled in 2003 for \$300 million.

- *Annie Deck-Miller*