

# Medicare Matters: Part II

## Medicare Myths

by **Stephanie Frazier Stacy & Jill Gradwohl Schroeder**

*Editor's Note: "Medicare Matters" is a three-part series addressing several of the ways in which Medicare's right to recover conditional payments impacts personal injury claimants, lawyers and insurance carriers. Part I of the series discussed Medicare's new Mandatory Insurer Reporting Requirements and touched on how reporting will change the way personal injury claims are managed and settled. This article, Part II of the series, identifies and dispels some of the myths surrounding Medicare's right to reimbursement from personal injury settlements, so lawyers can better comply with the federal law and protect their clients and themselves from liability to Medicare. Part III of the series will address utilizing Medicare Set-Aside accounts (MSAs) when settling injury claims where Medicare may have or claim a right to recover conditional payments in the future.*



*"The Great enemy of the truth is very often not the lie—deliberate, contrived and dishonest, but the myth—persistent, persuasive and unrealistic."*

*John F. Kennedy*

If myths are born from the natural human desire to simplify that which dumbfounds us, it's no wonder so many myths have developed around Medicare's right to be reimbursed from injury settlements.

When Medicare came into existence in 1965, it was the primary payer for medical services provided to Medicare beneficiaries, except when workers' compensation coverage was available.<sup>1</sup> In 1980, in an effort to shift responsibility for payment of medical expenses to private insurance plans whenever

possible, Congress passed the first of a series of provisions referred to collectively as the Medicare Secondary Payer (or MSP) statutes, which established Medicare as a "secondary payer" to certain other insurance plans (identified as "primary payers").<sup>2</sup> As a secondary payer, Medicare was only "conditionally" required to pay for medical treatment and services, with the expectation of reimbursement once the primary insurance plan paid on the Medicare beneficiary's personal injury claim. In 2003, prompted by skyrocketing Medicare costs, Congress made additional changes designed to resolve conflicting judicial opinions interpreting the MSP provisions and to further strengthen Medicare's secondary payer status by clarifying that Medicare is always considered a secondary payer whenever a

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primary insurance plan (including self-insurance) has made or should have made a primary payment for medical services provided to a Medicare beneficiary.<sup>3</sup>

Primary insurance plans are defined very broadly to include group health insurers,<sup>4</sup> workers' compensation insurers,<sup>5</sup> liability insurers and those who self-insure for liability (including auto liability insurers, uninsured and underinsured motorist coverage, homeowners' liability insurers, malpractice insurers, product liability insurers and general casualty insurers).<sup>6</sup> In February 2008, the federal regulations implementing the MSP statutes were amended to clarify that a primary payer's "responsibility" for payment is not limited to just those situations where the primary payer accepts liability for the injuries which required medical treatment. Instead, though a primary payer's responsibility to pay may be demonstrated by a judgment, it may also be demonstrated by a payment conditioned on giving a waiver or release to the primary payer or its insured (whether or not there is a determination or admission of liability), and can be demonstrated by "other means" including but not limited to a settlement, award, or contractual obligation.<sup>7</sup>

The MSP statutes and regulations give Medicare something far more powerful than an ordinary lien or subrogation right. Medicare has a priority right of reimbursement which allows it to seek recovery of its conditional payments from virtually everyone involved in a personal injury claim—the parties, the lawyers, the insurers, and even the medical providers. Medicare has a direct right of action to recover its conditional payments from any entity who has *received* a primary payment (such as payment of settlement proceeds, payment of medical expenses or payment of a subrogation claim), and may seek recovery directly from Medicare beneficiaries, attorneys, physicians, medical providers, state agencies and private insurers.<sup>8</sup> And if those who have received primary payments fail to reimburse Medicare as required by federal law, Medicare may recover its conditional payments through a direct cause of action against the insurer or self-insured entity who issued the primary payment in the first place—even though the primary payer already paid the beneficiary or other party.<sup>9</sup> Finally, if Medicare resorts to initiating legal action to recover its conditional payments, it may recover *twice* the amount of its conditional payments, plus interest,<sup>10</sup> and it has six years to sue for recovery of secondary payments after the right of action accrues.<sup>11</sup>

It is challenging to navigate the maze of statutes and regulations governing Medicare's sweeping rights of recovery against personal injury claimants, lawyers and insurance carriers,<sup>12</sup> but it is nearly impossible to actually incorporate the MSP rules into the daily routine of a personal injury practice without entirely disrupting the process. For instance, although Medicare's right to reimbursement is often a significant obstacle to settlement, Medicare will not participate in parties' settlement negotiations or attend mediations,<sup>13</sup> and Medicare will

not finally determine the amount it is owed until *after* it is notified the personal injury claim is settled.<sup>14</sup> Once an injury claim is settled, the law requires Medicare beneficiaries to reimburse Medicare's conditional payments within 60 days of receiving the settlement funds,<sup>15</sup> yet it routinely takes Medicare's recovery contractor several months (or longer) to identify the amount it is owed and issue a demand letter identifying the amount Medicare must be paid.<sup>16</sup>

Perhaps most frustrating is the fact that Medicare's recovery rights are totally unaffected by the factors which commonly drive evaluation and settlement of personal injury cases—things like liability determinations under state law, issues of contributory and comparative negligence, burdens of proof, rules of evidence and limitations on recoverable damages. When seeking reimbursement of conditional payments, Medicare does not take into account issues of disputed liability<sup>17</sup> or preexisting conditions which the parties considered unrelated to the accident.<sup>18</sup> Medicare will not recognize efforts to allocate settlement proceeds to damages other than medical expenses (such as pain and suffering) unless the allocation is based on a court order issued on the merits of the case.<sup>19</sup> Medicare is not bound by the terms of settlement agreements which purport to limit or eliminate recovery of medical expenses or dictate how disbursement of the settlement proceeds should be made.<sup>20</sup>

Over the years, Medicare myths have developed as frustrated lawyers struggled to find effective strategies for settling personal injury cases involving Medicare, and looked for efficient workarounds to avoid the lengthy delays inherent in the MSP bureaucracy. You've probably heard many of the myths discussed below; perhaps you've even relied on a few and waited nervously for time to tell whether your reliance was justified. Lawyers have perpetuated the Medicare myths because, at least anecdotally, they appeared to work—most of us cannot name a single client or colleague who has been sued for failing to protect Medicare's interests when settling a personal injury case. In reality it hasn't been reliance on the myths that kept lawyers and litigants out of trouble with Medicare, but rather the fact that very few personal injury settlements were actually reported to Medicare, so it was unaware of the opportunity for reimbursement.

Today, lawyers who bring and defend personal injury cases are becoming increasingly more aware of Medicare's recovery rights, and are changing the way they handle and settle personal injury claims involving Medicare beneficiaries. Those who are reluctant to change should be aware that, with the recent enactment of Medicare's new Mandatory Insurer Reporting Requirements,<sup>21</sup> the days of flying under Medicare's radar are gone. Very soon, Mandatory Insurer Reporting will require insurers to notify Medicare electronically *each time they make a payment, settlement or judgment to a Medicare beneficiary claiming*

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*personal injury.*<sup>22</sup> Armed with detailed information on every payment made to a claimant entitled to Medicare, it is expected Medicare will become considerably more aggressive in pursuing reimbursement from personal injury settlements and judgments.

In the wake of Mandatory Insurer Reporting, continued reliance on outdated Medicare myths which promise simple solutions and shortcuts is no longer wise, and could expose lawyers and their clients to future liability in a case they believed was finally settled. This article will dispel some of the common myths which have been perpetuated over the years so those who bring and defend personal injury claims can better advise and protect their clients, and themselves.

**MYTH: *If the plaintiff is under 65 you don't need to worry about Medicare claiming a right to be reimbursed from any personal injury settlement or judgment.***

**FACT:** Medicare entitlement is not limited to citizens over age 65, but can include a citizen of any age who: 1) has been entitled to Social Security disability benefits for 24 months; 2) received a disability pension from the railroad retirement board and meets certain conditions; 3) has Lou Gehrig's disease (amyotrophic lateral sclerosis); 4) is the child or widow(er) age 50 or older, including a divorced widow(er), of someone who has worked long enough in a government job where Medicare taxes were paid and meets the requirements of the Social Security disability program; 5) has end stage renal disease.<sup>23</sup> If a plaintiff is entitled to receive Medicare benefits for any reason, either at the time of the accident or before any settlement or judgment, counsel should take steps to identify the amount of the conditional payments as early as possible, and protect Medicare's interests in the event of settlement or judgment in a personal injury case.

**MYTH: *If Medicare hasn't sent a conditional payment letter, it isn't expecting reimbursement.***

**FACT:** Unlike traditional liens and subrogations, Medicare's right to recover conditional payments is not predicated on formal written notice of any kind. While Medicare may—through the Medicare Secondary Payer Recovery Coordinator (the MSPRC)—give notice to parties of its intent to pursue reimbursement and provide an estimate of its conditional payments (commonly referred to as a "conditional payment" letter) Medicare's statutory right to reimbursement is not dependent on or triggered by providing notice of any sort.<sup>24</sup> Actually, the only "notice" provision in the MSP regulations requires that primary payers notify Medicare if conditional payments were made which should have been made by a private insurance plan—not the other way around.<sup>25</sup>

**MYTH: *Medicare can't seek recovery of the entire settlement amount, especially if the plaintiff was not "made whole" by the settlement.***

**FACT:** In cases where Medicare's conditional payments equal or exceed the amount of the personal injury settlement or judgment, *Medicare can recover the total amount of the settlement or judgment, less procurement costs.*<sup>26</sup> When Medicare's conditional payments are less than the amount of the personal injury settlement or judgment, Medicare's recovery will be computed by determining the ratio of the procurement costs to the total judgment or settlement, and applying that ratio to Medicare's reimbursement claim to determine Medicare's share of the procurement costs, then subtracting Medicare's share of the procurement costs from Medicare's reimbursement claim to determine the amount of Medicare's recovery.<sup>27</sup>

**MYTH: *If the settlement or judgment doesn't purport to compensate the plaintiff for medical expenses, Medicare can't seek reimbursement from the proceeds.***

**FACT:** One cannot avoid Medicare's right to reimbursement in a personal injury claim merely by recharacterizing damages in the context of the settlement agreement, nor can one preclude Medicare's recovery simply by omitting a claim for medical expenses from the complaint if medical expenses are recoverable under the applicable law.<sup>28</sup>

This point was emphasized recently by the United States Court of Appeals for the Eighth Circuit in ruling that Medicare has a right of reimbursement from settlement proceeds received in a wrongful death case despite the next of kin's claim that the settlement did not include compensation for any medical expenses.<sup>29</sup> Medicare had paid \$77,403.67 for the decedent's final medical expenses, and claimed a right to reimbursement in that amount from the wrongful death settlement proceeds. The next of kin admitted the medical expenses would have been recoverable in a personal injury case had the decedent survived, but claimed the medical expenses were not "damages" recoverable in a wrongful death lawsuit under Missouri law. The Eighth Circuit disagreed, noting among other things that Missouri had a combined wrongful death and survival statute and, because the next of kin had claimed all damages available under the Missouri wrongful death statute, the settlement necessarily resolved any claim for medical expenses and consequently Medicare had a right to be reimbursed from the settlement proceeds.<sup>30</sup>

**MYTH: *Once settlement proceeds are distributed and the release is signed, Medicare can only seek reimbursement from the Medicare beneficiary.***

**FACT:** Responsibility for reimbursing Medicare rests not only with the beneficiary, but also with the primary payers (private insurers and self-insured plans) and with any person or entity who has received funds from the primary payer due to the alleged accident.<sup>31</sup> The signing of a release between the parties is not binding on Medicare, and the distribution of set-



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tlement proceeds has no effect on Medicare's right to seek reimbursement from any of the parties and entities responsible under federal law for protecting Medicare's right to reimbursement.<sup>32</sup> Moreover, although most releases contain indemnification language requiring the plaintiff to indemnify the primary payer for any sums paid to Medicare as a result of Medicare's reimbursement claim, indemnification provisions offer incomplete protection because a beneficiary who lacks the funds to repay Medicare initially is unlikely to have funds available to indemnify the primary payer later.

### *MYTH: Medicare won't sue lawyers on small settlements.*

**FACT:** Meet Paul J. Harris, a lawyer in West Virginia who settled his client's personal injury case for \$25,000 and was sued by the federal government when he failed to timely distribute Medicare's share of the settlement proceeds (\$11,367.78 plus interest) within 60 days of receiving the settlement funds.<sup>33</sup> The attorney filed a Motion to Dismiss the collection suit, claiming he could not be held individually liable under the MSP statutes because he had notified Medicare of the settlement and his intent to disburse the settlement funds, and he and Medicare had not reached any specific agreement on the amount of reimbursement to be paid. The Court overruled the Motion to Dismiss and allowed the action to proceed directly against the attorney.<sup>34</sup>

Thereafter the government filed a Motion for Summary Judgment and, on March 26, 2009, the motion was granted and the attorney was ordered to pay the full amount of Medicare's recovery demand, plus interest which had been accruing since early 2006 (60 days after Medicare sent its demand letter).<sup>35</sup> The Court did not allow the attorney to contest the amount of recovery being sought, noting that if the attorney had "any qualms" concerning the extent of his liability under the MSP rules he should have challenged Medicare's recovery demand through the administrative appeals process, and his failure to do so precluded him from contesting Medicare's reimbursement determination in the collection matter.<sup>36</sup> The Court also stated:

This Court finds that the government is entitled to judgment as a matter of law. In this case, the [plaintiffs] and [attorney Harris] received a \$25,000.00 settlement and primary payment in the underlying personal injury action from the ladder retailer. Because the ladder retailer took responsibility for the payment of [the plaintiff's] medical services, demonstrated by "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," the government can now receive reimbursement for the medical services paid for by Medicare. 42 U.S.C. § 1395y(b)(2)(B)(iii). Furthermore, this Court holds that Mr. Harris is individually liable for reimbursing Medicare in this case because the

government can recover "from any entity that has received payment from a primary plan," including an attorney. 42 C.F.R. § 411.24(g). [Emphasis in original.]

In holding Mr. Harris personally liable for the full amount of the reimbursement, plus interest, the Court sent a strong message that MSP issues must be taken seriously when personal injury cases involving Medicare beneficiaries are settled.

**MYTH: Insurers can adequately protect Medicare's right to reimbursement by including "Medicare" as a payee on the settlement check and letting the plaintiff's attorney handle the details.**


**FACT:** Including Medicare as one of several payees on a single settlement check may be common practice, but it will not necessarily protect the primary payer from the possibility of duplicative payments and legal action to recover double damages. The regulations require MSP reimbursement to be made by issuing payment directly to Medicare, or by issuing payment in the manner Medicare directs in its recovery demand letter.<sup>37</sup> It is Medicare's practice *not* to endorse multi-party settlement checks until all other payees have endorsed the check, after which Medicare deposits the settlement funds into an interest bearing account.<sup>38</sup> If all other payees are willing to endorse the multi-party check and allow Medicare to deposit the entire check, the process works smoothly. However, if the dollar amount of the multi-party check is insufficient to reimburse Medicare for the full amount of its claim (as would occur when a case settles for an amount less than Medicare's conditional payments), or if one of several payees refuses to endorse the check or allow Medicare to deposit the check into its own interest bearing account, Medicare will refer the matter for legal action to recover its conditional payments,<sup>39</sup> thereby exposing the primary payer to the possibility of double damages plus interest.<sup>40</sup>

Also keep in mind that if a "primary payer makes payment to an entity *other than* Medicare when it is, or should be, aware that Medicare has made a conditional primary payment," the primary payer can be required to reimburse Medicare, *even if it has already paid the beneficiary or another party*.<sup>41</sup> Consequently, if a settling carrier wants to be confident it has protected itself against the possibility of a duplicative payment to reimburse Medicare even after having paid the claimant, the safest practice is to prepare a separate check to Medicare for the full amount of its recovery claim.

## Conclusion

The rules and regulations governing Medicare's priority right to be reimbursed from personal injury settlements and judgments are confusing, inequitable, and always frustrate the parties' legitimate interest in expeditiously resolving claims. That myths have evolved in this environment is not surprising. It isn't feasible in a single article to untangle all the MSP rules

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or dispel all the Medicare myths which have sprung from the confusion, but frankly it isn't necessary either. The MSP process is governed by hundreds of different statutory and regulatory provisions, but all are designed to facilitate the same outcome: ensure Medicare gets repaid from personal injury proceeds whenever possible and before anyone else, including the Medicare beneficiary. Personal injury practitioners who continue to rely on myths which promise shortcuts and workarounds to avoid reimbursing Medicare can expose all those participating in the settlement--the plaintiff, the defendant and their insurer, and the attorneys--to additional liability for failing to reimburse Medicare, and the possibility of paying double damages plus interest if the government decides to pursue litigation to recover amounts it is owed. The MSP system is far from perfect, but the time has come for personal injury practitioners to move beyond the myths so they can better advise and protect their clients, and themselves. 

### Endnotes

- <sup>1</sup> 42 U.S.C. §1395
- <sup>2</sup> 42 U.S.C. §1395y(b)(2)(A)(ii)
- <sup>3</sup> Medicare Prescription Drug, Improvement, and Modernization Act of 2003, *Pub. L. No. 108-173, §301, 117 Stat. 2066* (2003)
- <sup>4</sup> 42 C.F.R. §411.20 and 42 C.F.R. §411.21
- <sup>5</sup> 42 C.F.R. §411.20 and 42 C.F.R. §411.40(a)
- <sup>6</sup> 42 C.F.R. §411.20 and 42 C.F.R. §411.50(b)
- <sup>7</sup> 42 U.S.C. §1395y(b)(2)(B)(ii) and 42 C.F.R. §411.22
- <sup>8</sup> 42 C.F.R. §411.24(g)
- <sup>9</sup> 42 C.F.R. §411.24 (i)
- <sup>10</sup> 42 U.S.C. §1395y(b)(2)(B)(iii) and 42 C.F.R. §411.24
- <sup>11</sup> 28 U.S.C. §2415(a)
- <sup>12</sup> 42 U.S.C. §1302; 42 U.S.C. §1395y and 42 C.F.R. §§411.20 through 411.54; 42 C.F.R. §§462 and 464
- <sup>13</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.2 and 50.4.3
- <sup>14</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.1 and 42 C.F.R. §411.24(b)
- <sup>15</sup> 42 C.F.R. §411.24 (h). See also 42 U.S.C. §1395y(b)(2)(B)(ii)
- <sup>16</sup> See copy of Standard Recovery/Initial Determination Letter to Beneficiary, Medicare Secondary Payer (MSP) Manual, 50.5.1.1 (Exhibit 2)
- <sup>17</sup> 42 U.S.C. §1395y(b)(2)(B)(ii)-(iii) and 42 C.F.R. §411.22(b)(2)
- <sup>18</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.5
- <sup>19</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4
- <sup>20</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.4.4
- <sup>21</sup> Medicare, Medicaid and SCHIP Extension Act of 2007, Public Law 110-173
- <sup>22</sup> 42 U.S.C. §1395y(b)(8)
- <sup>23</sup> 42 U.S.C. §1395-1395ggg
- <sup>24</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.2.2
- <sup>25</sup> 42 C.F.R. §411.25(a)
- <sup>26</sup> 42 C.F.R. §411.37 (d)
- <sup>27</sup> 42 C.F.R. §411.37(c)
- <sup>28</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.1, 50.4.4 and 50.5.4.1.1
- <sup>29</sup> *Mathis v. Leavitt*, United States Court of Appeals for the Eighth Circuit, No. 08-1983 (January 30, 2009)
- <sup>30</sup> *Mathis v. Leavitt*, United States Court of Appeals for the Eighth Circuit, No. 08-1983 (January 30, 2009) at p. 4. See also Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.1.1
- <sup>31</sup> 42 C.F.R. §§411.22(a) and 411.24(g) and (i)
- <sup>32</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.3
- <sup>33</sup> *United States of America v. Paul J. Harris, Esq.*, United States District Court for the Northern District of West Virginia, Civil Action No. 5:08-CV-102, Memorandum Opinion and Order Denying Defendant's Motion to Dismiss (November 13, 2008)
- <sup>34</sup> *United States of America v. Paul J. Harris, Esq.*, supra. See also 42 U.S.C. §1395y(b)(2)(B)(iii)
- <sup>35</sup> *United States of America v. Paul J. Harris, Esq.*, United States District Court for the Northern District of West Virginia, Civil Action No. 5:08CV102, Memorandum Opinion and Order Granting Plaintiff's Motion for Summary Judgment and Denying as Moot Plaintiff's Motion to Stay Discovery [2009 WL 891931 (N.D.W.Va.)].
- <sup>36</sup> *United States of America v. Paul J. Harris, Esq.*, United States District Court for the Northern District of West Virginia, Civil Action No. 5:08CV102, Memorandum Opinion and Order Granting Plaintiff's Motion for Summary Judgment and Denying as Moot Plaintiff's Motion to Stay Discovery [2009 WL 891931 (N.D.W.Va.)].
- <sup>37</sup> 42 C.F.R. §411.22(c)(1) and (2)
- <sup>38</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.3 (B)
- <sup>39</sup> Medicare Secondary Payer (MSP) Manual, Ch. 7, 50.5.4.3 (B)
- <sup>40</sup> 42 C.F.R. §411.24(c)(2)
- <sup>41</sup> 42 C.F.R. §411.24(i)(2) (Emphasis supplied)

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