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### MEDICARE LIENS

Everyone who handles personal injury claims for the plaintiff is plagued by the existence of Medicare liens. Federal government regulations that relate to Medicare liens give the government the right to recover its payments not only from the plaintiff who received the Medicare benefits and the ultimate tort settlement but from the defendant, the insurer, and even the attorney for the plaintiff through whose hands the insurance settlement passed. Thus, the government has what is known as a “super lien” which strikes fear in the hearts of all those involved in a tort settlement with an unpaid Medicare lien.

Aside from the problem created when a case of less than 100% liability results in a settlement which leaves the plaintiff little or nothing after paying expenses and the Medicare lien, the real problem is that it is difficult, if not impossible, to get the government to take a position on the amount of the lien so that it can be paid and the settlement concluded. It is not unusual to take months and even years to get a final number from the Federal government on the Medicare lien. Thus, the plaintiff's attorney is forced to keep money in a trust account for an inordinate period of time when the plaintiff is clamoring for those funds.

A ray of hope was created by the decision of the Fifth Circuit in Thompson v Goetzmann, 315 F. 3d 457 (5<sup>th</sup> Cir. 2002). In that case, the Court held that since the Government's right to recover what it had paid was conditioned on

there being a “primary payor” and since a primary payor is defined within the Medicare regulations as an insurer which pays “promptly,” (meaning within 120 days after receipt of the claim), an insurer of a defendant in a tort claim could never be considered to be a primary payor. As a consequence, the Fifth Circuit rejected the Government’s right to collect back any of its payments made to a plaintiff in a traditional tort action thus eliminating any lien.

Upon rehearing en banc, the Thompson v Goetzmann Court withdrew its opinion and issued an amended opinion arriving at the same result but explaining that since that result could be reached without making the findings it had in its original opinion, the language was unnecessary. Notwithstanding that withdrawal, the language in the en banc opinion still deals what should be a mortal blow to the Federal government’s right of reimbursement of Medicare payments in a tort claim.

“Notwithstanding the foregoing withdrawals, we remain convinced that the plain language of the MSP statutes makes the reasonable expectation of the prompt payment a requirement for the government’s collection from those ‘primary plans’ listed in §1395y(b)(2)(A)(ii) .... In short, ...absent an expectation of prompt payment, the government had no cause of action to collect from a self insured plan or from any of the other primary plans enumerated in 1395y(b)(2)(A)(ii)” Thompson v Goetzmann, 337 F. 3d 489, 492 (5<sup>th</sup> Cir. 2003).

Unfortunately, that is hardly an end to the story. The government refused to accept the opinion of the Fifth Circuit in Thompson v Goetzmann, supra, even though it was the only appellate decision on the subject and continued to

demand payment of its Medicare liens. Lawyers for the plaintiff were thus placed in the unenviable position of having potential personal liability to the U.S.

government for a Medicare lien if they failed to withdraw sufficient monies from a settlement to cover such a lien and, on the other hand, potential liability to their clients for paying a lien to which the government may not have been entitled.

For better or worse, those of us in the Eleventh Circuit no longer have that quandary thanks to the case of U.S. v Baxter International, 345 F. 3d 866 (11<sup>th</sup> Cir. (Ala.) 2003). Baxter grew out of a settlement of a silicone breast implant class action in which the U.S. government intervened in order to recover its Medicare lien for benefits provided to some of the plaintiffs as a result of their treatment for the faulty implants. The Eleventh Circuit rejected the reasoning of the Thompson v Goetzmann Court and with a broad brush simply held that it was the clear expectation of the Medicare law to recover payments made to plaintiffs who, in turn, made recovery in tort suits and, as a consequence, the government's lien right should be enforced.

The Baxter case puts us right back to where we were before Thompson v Goetzmann, supra. At least in the Eleventh Circuit, controlling law is that a lien exists and must be recognized. Where does that leave us with respect to getting the government to make a final determination of the amount of its lien so that a case can be closed and the remaining settlement proceeds can be disbursed? Not with very many options, I am afraid. The Federal government is not bound by State Court orders. Bringing a motion to determine lien before the trial judge

in a State Court action and serving the Federal government is a waste of time. They routinely ignore such notices, knowing full well that any order would not be binding and, therefore, can also be ignored. Bringing a declaratory judgment action in Federal Court may be an equal waste of time. Fanning v United States, 346 F. 3d 386 (3<sup>rd</sup> Cir. (Pa.) 2003) holds that a Federal District Court has no jurisdiction to determine a declaratory action under these circumstances.

There is a process set up by the government in the Medicare Intermediary Manual, Part III, Sec. 3419, which provides for the seeking of a waiver or reduction in the amount of reimbursement. This is typically done in a situation where the amount of the lien takes a large part, if not all, of the settlement. When such a process is initiated, the third party intermediary who has the right to enforce the lien is required to consider out-of-pocket expenses, age and assets of the client as well as the physical and mental impairments suffered as a result of the tort and make a determination as to whether the lien should be waived or reduced. In this process, the intermediary is required to provide an itemized list of expenses on which it claims its lien and the attorney for the original plaintiff can show that these expenses do not relate to the injuries suffered in the tort and thus reduce the lien. In addition, if the plaintiff cannot meet his or her ordinary and necessary expenses to maintain their usual standard of living if reimbursement is allowed, the entire lien can be waived. There is a right of appeal to an Administrative Law Judge but obviously all of that can take a long time to accomplish.

The alternative is to become a very “squeaky wheel” bombarding the U.S. Attorney’s Office and the third party intermediary with letters and telephone calls to get them interested in concluding the lien process.

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