

# COUNTERPOINT

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## **ZELEPPA – SUPERIOR COURT'S HALF ANSWER TO MEDICARE REIMBURSEMENT**

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Defense counsel and insurers have long been obligated under the Medicare Secondary Payer Act (MSPA) to satisfy liens held by Medicare for payments made for treatment resulting from personal injury that is the subject of tort litigation. Typically counsel will obtain a recovery demand letter issued by Medicare to determine the amount of the lien thereby allowing counsel to confirm that the lien is subsequently satisfied. As the ultimate safeguard defense counsel and liability insurers have made a practice of naming Medicare as a payee on the settlement check along with the plaintiff. An alternative has been to pay the settlement or verdict into court pending notification from Medicare that all outstanding Medicare liens have been satisfied. On November 17, 2010 the Pennsylvania Superior Court ruled in *Zaleppa v. Seiwel*, 98 A.3rd 632 (Pa. Super. 2010) that there is no basis under federal or Pennsylvania law for doing so. *Zaleppa* arises out of a motor vehicle accident on October 16, 2006. Ms. Zaleppa was 69 years old at the time of the accident. Kristen Seiwel, the defendant, admitted liability and the case was tried on the issue of damages. The jury entered a verdict in the amount of \$15,000 comprised of \$5,000 for future medical expenses and \$10,000 for past, present and future pain and suffering. Zaleppa did not exhaust her PIP benefits through her own automobile insurance. Therefore, she was prohibited from recovering past medical expenses pursuant to the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. Section 1722.

After the verdict, Seiwel requested post-trial relief in the form of a court order allowing her to identify Medicare as a payee on the draft or in the alternative

to pay the money into court pending confirmation from Medicare that the lien has been satisfied. The trial court denied that post-trial request and the Superior Court addressed the issue of whether the MSPA allows a private entity to assert the rights of the United States Government regarding a potential claim for reimbursement of a Medicare lien.

The court provided a worthwhile analysis of the defendant's, and her insurer's, obligations under the statute. Pursuant to the MSPA, Medicare may make payment if a primary plan has not made or cannot reasonably be expected to make prompt payment for medical services. However, where a private insurer is required to pay for the treatment for which Medicare has already paid, the MSPA requires that Medicare must be reimbursed. The federal regulations indicate that only a recovery demand letter from Medicare triggers the duty to reimburse Medicare. The Superior Court noted that "if an outstanding Medicare lien existed, we recognize that either Zaleppa, as the 'entity that receive[d] payment from [the] primary plan[,] or Seiwel and her insurer, as the primary plan, must reimburse Medicare."

In rejecting Seiwel's argument, the court found that her obligation to reimburse Medicare and Medicare's right to reimbursement are distinct. Under the statutory scheme, only the United States government is permitted to enforce its right to recovery. This can only happen after a demand letter has been issued. In addition, the federal appellate courts have consistently held that private parties are not authorized to act on behalf of the federal government. In the end, the court concluded that "the express language of the MSPA, bestowed only the United

States government with the authority to recover outstanding conditional Medicare payments."

Seiwel argued that because she was obligated to make reimbursement to Medicare for its lien, she was likewise permitted to assert that lien in order to assure that it was properly satisfied. The court held that "only the United States Government is authorized to pursue its own right to reimbursement." Further this can only occur "after it has issued a recovery demand letter to that primary plan." Otherwise the reimbursement obligation has not yet been triggered. The court found it significant that Zaleppa was the beneficiary of a verdict against Seiwel and held that only payment in full by Seiwel to Zaleppa can properly satisfy the resulting judgment. Where the United States Government is not a party to the claim, the duties owed to Medicare "are irrelevant with respect to satisfying the judgment . . . ."

Lastly, the court concluded that the relief requested by Seiwel, if granted, would contravene the concept of a judgment. In order to satisfy the judgment, payment must be made in full to Zaleppa. If Seiwel's request for relief was granted, then Zaleppa as plaintiff would be receiving less than the full amount of the judgment and the judgment could not be satisfied.

The most significant point about this decision is that there was no lien to satisfy. Plaintiff did not exhaust her PIP benefits and therefore, all medical bills were paid by plaintiff's own auto insurance. To the extent that the verdict included medical treatment, it included only future, not past medical treatment. Therefore, it was an easy decision by the

Superior Court to rule that the plaintiff cannot be cut out of a portion of the verdict because of a lien that did not exist for treatment that plaintiff had not, and might never, receive. However, most cases involve actual liens for actual past treatment. Usually what is at issue is the amount of the lien and which bills had been satisfied while there is no dispute that a lien does in fact exist. Thus, in a case where treatment has been received, it should be argued that the *Zaleppa* decision is distinguishable and is limited to cases where there is no lien.

In addition, the Superior Court fails to see the bigger picture and the relevant obligations resulting from this statutory framework. The Superior Court held that the plaintiff is entitled to the full amount of her judgment and that to put Medicare's name on the check would prohibit satisfaction of the judgment. This overlooks the fact that the judgment is not solely the plaintiff's. She entered into a contractual agreement, as did the defendant. In addition, both parties are

bound by the MSPA which states that the plaintiff is not the only entity who is entitled to recover and that the amount reimbursed to Medicare is directly related to satisfaction of the judgment itself. Medicare owns a piece of the judgment, yet the Superior Court cut them out of the loop. Most significant for the defense bar is that if the Medicare lien is not satisfied, it is the defendant and the defendant's insurer who typically have the deepest pocket from which Medicare would seek to recover. When interest and costs are added, the exposure to the defendant and the defendant's insurer can be substantial. Yet the Superior Court does not answer the question of what recourse is available for the defendant other than to hope that plaintiff does the right thing.

Nonetheless, the Superior Court has taken off the table a common remedy used by defendants and their insurers to protect themselves where the plaintiff does not properly satisfy a Medicare lien thereby exposing the defendant and

the insurer to liability under the MSPA. Defense counsel should make prompt efforts to obtain a demand letter from Medicare and to have that letter updated in the time leading up to settlement. An alternative is to have the plaintiff agree to defend and indemnify the defendant and the defendant's insurer if the lien is not satisfied. This has limited value since it does not protect the defendant from Medicare. Rather, indemnification language in the release only gives defendant a remedy after it has already paid out to Medicare. Nor does an indemnification agreement protect against the possibility that the plaintiff or plaintiff's counsel is judgment proof. Other options include making the settlement agreement contingent upon satisfaction of any liens with the settlement money paid into a trust fund until that time.

