Obtaining Medi-Cal's and Medicare's written disclaimer of lien in wrongful death cases

Dispensing with these liens is much easier and faster in wrongful death claims than in survival claims

By Daniel H. Rose

In wrongful death cases in which a Medi-Cal or Medicare recipient received medical treatment for their final injury or illness, the tortfeasor's liability insurer will almost always insist, as a precondition of payment of any settlement proceeds, that it be provided with a written statement from Medi-Cal and Medicare identifying their interest, or disclaiming their interest, in the settlement proceeds.

While resolving Medi-Cal and Medicare liens in *injury cases* can take several months or more, be hotly disputed, and be a source of great anxiety for attorneys and their clients who eagerly await their settlement funds, written disclaimers of Medi-Cal's and Medicare's interests in *wrongful death settlements* can be obtained in a matter of weeks if the claim and the lien interests are handled with care. If the attorney begins the process long before the claim is settled, the insurer will be in a position to promptly disburse the settlement funds following settlement. Here's how.

The claim must explicitly be for wrongful death only

Medi-Cal and Medicare will readily disclaim any interest in the settlement proceeds only if the claims being settled are clearly for wrongful death *only* and do not include a survival claim (CCP 377.34), a claim by the decedent's estate, or any claim for medical expenses.

Regarding Medi-Cal, the Supreme Court in *Fitch v. Select Products Co.* (*State Dept. Of Health Services*) (2005) 36 Cal.4th 812, held that, because medical expenses for treating the decedent's final illness or injury, including compensation for medical services provided to the decedent by Medi-Cal, are not recoverable in a wrongful death action, a Medi-Cal lien may not be asserted in a wrongful death action.

Medicare follows its own internal guidelines which provide that where, as in California, the State's wrongful death statute does not provide for the recovery of medical expenses, Medicare will not assert a right to any of the settlement proceeds. The Medicare Secondary Payer (MSP) Manual, Chapter 7 – Contractor Recovery Rules, section 50.5.4.1.1 – Wrongful Death Statutes, states in part: "Wrongful death statutes are State laws that permit a person's survivors to assert the claims and rights that the decedent had at the time of death. . . . When a liability insurance payment is made pursuant to a wrongful death action, Medicare may recover from the payment only if the State statute permits recovery of the deceased's medical expenses."

In *Bradley v. Sebelius* (11th Cir. 2010) 621 F. 3d 1330, where claims by the decedent's estate and the survivor's wrongful death claims were brought and settled together pre-litigation, the Court of Appeal held that Medicare could seek reimbursement only from the portion of the settlement apportioned to the estate, and not from the settlement proceeds apportioned to the survivors' wrongful death type claims.

Decision time: Forgo the survival action?

The attorney must therefore decide at the outset whether the potential net recovery for the clients, taking into account likely medical liens, warrants a survival action or should be limited to solely a wrongful death claim. If survival or estate claims are brought, a morass of issues will be raised with respect to Medi-Cal's and Medicare's lien interests, which can take a very long time to resolve.

If the claim being brought is solely for wrongful death, the attorney must be clear from the beginning, in all correspondence with insurance claims representatives, that the clients do not include the estate, that the claims being brought are solely for wrongful death, that no survival action is being brought and, at the risk of being redundant, explicitly state that no claim is being made for medical expenses.

While it is *possible* to obtain Medicare's disclaimer of interest in a case settled pre-litigation, practically speaking the only way you will be able to obtain such disclaimer in a reasonable amount of time and without engaging in Medicare's lengthy scrutiny of your claim and the settlement documents, is to file (but not serve) a wrongful death complaint. The attorney should alert the claims rep ahead of time regarding the filing, explaining the reasons for doing so, and obtain the claims rep's approval.

Drafting the complaint

The complaint must be drafted very carefully: Entitle the complaint "Complaint for Damages for Wrongful Death (C.C.P. 377.60 and 377.61);" Label the cause of action "Wrongful Death;" explicitly allege "This lawsuit is solely a wrongful death action brought by each plaintiff solely on their own individual behalf pursuant to California's Wrongful Death Code of Civil Procedure sections

377.60 and 377.61. No claim is being made for medical expenses or for any damages suffered by decedent. No claim is being made on behalf of decedent or any estate of decedent or as the personal representative of decedent or any estate."

Allege the damages suffered as "pecuniary and non-pecuniary loss resulting from the loss of society, love, comfort, attention, services and support of decedent, and memorial, funeral, and burial expenses, incidental expenses, and other damages."

In the prayer: "For wrongful death damages, costs, prejudgment interest, and such other relief as the court may deem proper."

It is also important to make sure that the settlement agreement/release is not worded in a way which explicitly provides for your client's release of claims for medical expenses or survivor or estate claims as consideration for the settlement, which will understandably take some skill in negotiating. The CMS Region 9 MSP regional coordinator, who governs the unit that decides these matters in California cases, has reportedly expressly indicated that in some cases such settlement documents may be examined in order to determine Medicare's interests. In the unpublished California Court of Appeal case of *Shewry v. Pasternak* (2011 WL 1362122), the terms of the release were explicitly considered in determining Medi-Cal's lien rights. In *Bradley v. Sebelius* (11th Cir. 2010) 621 F. 3d 1330, the terms of the settlement were considered in determining Medicare's lien rights.

Fast-tracking the process

Implementation of the following process can shorten to a matter of weeks the time it takes to obtain Medicare's and Medi-Cal's written disclaimer of interest in your clients' wrongful death claim/settlement.

• ***Medi-Cal***

Open up a DHCS case by completing a personal injury online form submission at DHCS.ca.gov/PI. Then promptly send to the Department of Health Care Services (DHCS) (Third Party Liability and Recovery Division, Personal Injury Unit) a letter urgently requesting written confirmation that Medi-Cal has no lien or reimbursement rights with respect to the wrongful death claim being brought by your clients. In that letter, emphasize that, as set forth in the filed Complaint, the family's claims are solely for wrongful death pursuant to California's wrongful death statutes CCP 377.60 and 377.61, no claim is being made for medical expenses, that under CCP 377.61 claims for medical expenses are prohibited from being asserted in a wrongful death claim, and explain that the Supreme Court held in *Fitch* that a Medi-Cal lien may not be asserted in a wrongful death action.

Enclose with the letter a copy of the complaint, a HIPAA-compliant authorization signed by decedent's next of kin, and a copy of the death certificate. In order to obtain a disclaimer expeditiously, I recommend contacting the Medi-Cal Unit Chief (email me for contact information) expressing some urgency and kindly asking for assistance: For example, the clients need to be assured of zero liens before they will agree to the insurer's time-limited settlement offer. When I did so, the Unit Chief allowed me to send the above-described letter and materials directly to him via email and he issued Medi-Cal's disclaimer to me the following week.

• ***Medicare***

Open a case with CMS (I did so by calling). Then promptly fax a letter addressed to Medicare NGH Plan and MSPRC (the address for which at least as recently as October 2015 was P.O. Box 138832, Oklahoma City, OK 73113, MSPRC Tel 855-798-2627, Fax 405-869-3309) urgently requesting written confirmation that Medicare has no lien or reimbursement rights with respect to the wrongful death claim being brought by your clients.

In that letter, set forth the same exposition of California law described above re: Medi-Cal and in addition state that it is your understanding that, accordingly, Medicare may not assert any lien, subrogation or reimbursement rights with respect to your clients' claims and settlement, footnoting the text of the Medicare Secondary Payer (MSP) Manual, Chapter 7 – Contractor Recovery Rules, Section 50.5.4.1.1 – Wrongful Death Statutes set forth above (or any more recent version thereof there may be), and perhaps also cite the 11th Circuit *Bradley* case mentioned above.

Enclose with the letter CMS's own specific Proof of Representation Form signed by your next of kin client, a copy of the Complaint, and a copy of the death certificate. Medicare will then kick the matter out to the Medicare regional office. Following regional approval, CMS should issue a letter to you stating that Medicare has no right of recovery in the matter. I was able to accomplish the entire process from beginning to end in approximately five weeks.

A final warning

At some point after you open a case with CMS, you and/or your client may receive a "Medicare Secondary Payor Screening Form" which requests information about the accident, injury, third-party liability etc. Do *not* complete or return that form since, as CMS explained to me, doing so will send your case on a different trajectory and result in a lengthy delay and difficulty in obtaining your desired disclaimer of interest letter.

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