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From the Co-Editors
James L. Borin & Simeon R. Orłowski

MEDICARE SET-ASIDES IN LIABILITY CASES?

M. SEAN FOSMIRE¹ - CONTRIBUTOR

Medicare's right to reimbursement of medical expenses that it has paid for Medicare recipients normally applies to insurance claims or awards of damages for past medical expenses. If Medicare pays for a particular medical service, and a defendant is later found to be legally responsible for it, Medicare wants its money repaid. (See our December 3, 2008 issue, for important information on the new reporting requirements under the Medicare Secondary Payer program and for citations to our previous advisories on the MSP program.)

Redemptions of workers' compensation claims regularly involve a recovery for future medical expenses as well as those already incurred. Workers' compensation carriers and their attorneys have become familiar with the concept of "Medicare Set-Aside Arrangements" in redemptions of claims involving major injuries with the anticipation of significant future medical expenses. The MSP regulations adopted by CMS make specific provision for set-aside arrangements in workers' compensation cases, at 42 CFR 411.40-47. In encouraging the use of set-aside plans in workers' compensation cases, the Centers for Medicare and Medicaid Services (CMS) addresses the often-touchy issue of asserting a claim for reimbursement for something it has not yet paid, for medical treatment that has not yet been provided. Rather than asserting a reimbursement right, CMS encourages the plaintiff to set aside a defined portion of the settlement for those future expenses and CMS will review and approve the set-aside if it meets certain review conditions. The plaintiff is required to use that money

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for related medical expenses, once he becomes Medicare-eligible, until it is gone. After that point, Medicare will pick up as primary payer.

CMS takes the position that set-asides in workers' compensation redemptions are not mandatory, but are highly recommended. The only mandatory requirement is that the settlement must "consider and protect Medicare's interest". The risk that the claimant incurs if the recommendation is not followed, however, is that CMS would consider the claimant ineligible for any Medicare benefits in the future, or at least until the expenses equal the total amount paid in redemption of the claim.

What about set-asides in liability cases? The money claimed and paid in a judgment or settlement, after all, often does include future medical as a significant component of the claim. Neither the statute nor the regulations make any specific provision for set-asides in liability cases.

In the last few months, we have received several inquiries from carriers who have heard that CMS has adopted new requirements for set-asides in major liability cases as well. This is related to uncertainty surrounding the new reporting requirements that are being implemented this year. CMS reported in December 2008 that it had received information from several insurers that they had been told that the new MSP reporting requirements will mandate set-asides in liability cases. CMS has stated unequivocally that that advice is inaccurate. This confusion may have been fueled by statements made by some of the contractors who offer assistance to the plaintiff's bar and the insurance industry in calculating and managing set-aside arrangements. In August 2008, participants in a "Structured Settlement Thought Leadership Conference" focused on Medicare Set-Aside Arrangements as a new opportunity for expansion of their services, and the push has been on since then.

We can advise definitively that CMS has not adopted any new set-aside requirements in liability cases. Indeed, CMS has stated in a letter its current position that it will not try to impose any lien for benefits an insurer may pay for future medical expenses in a liability case unless the settlement agreement makes a specific allocation for future medical expenses. The take-away lesson: no settlement agreement in a liability case should make such an allocation, unless the plaintiff plans to seek CMS approval of a set-aside arrangement. (Absent a plan to do so, an allocation would be very unusual in liability cases, but, of course, is common in a jury verdict.)

CMS representatives have occasionally stated as a general proposition that set-asides are recommended whenever a liability settlement incorporates future medical expenses. There is no formal provision for reviewing or approving them, as there is for workers' compensation redemptions. CMS recently stated, in a teleconference in March 2009, that it will consider reviewing voluntary set-aside arrangements in liability settlements, if its personnel have time to do so.

There are commentators who have suggested that the current MSP statutes and regulations provide sufficient authority for CMS to require set-asides without any new regulations being adopted. That may or may not be the case, but CMS has not asserted such a new policy. What the statute does provide is that Medicare will not make payment for an item or service to the extent that "payment has been made" under a liability policy. That puts the risk squarely on the Medicare recipient.

Our reasoned conclusion is that we do not believe that CMS will try to surcharge an insurer or self-insured defendant for failing to provide for a set-aside in settling a liability case. We expect that it would adopt new regulations making express provisions for set-asides in liability cases, as it has for workers' compensation

cases, before doing so. Instead, the impetus for set-asides in liability cases in the current environment will probably come from the plaintiff's attorneys in individual cases, as an (entirely voluntary) additional precaution to ensure that the client's entitlement to Medicare coverage is protected.

There is no reason for the defense not to go along with a set-aside arrangement suggested by a plaintiff in the course of a settlement, so long as it does not affect the amount that is paid. Based on the current state of affairs, though, we see no reason for the defense to insist on a set-aside as a condition of settling a liability case.

THE COURT OF APPEALS HOLDS THAT INSURANCE COMPANY IS NOT OBLIGATED TO CONTINUE PAYING PIP BENEFITS TO MOTORCYCLE OPERATOR FOR 1986 MOTORCYCLE/MOTOR VEHICLE ACCIDENT SINCE THE MOTORCYCLE WAS UNINSURED AND THERE WAS NO PROMISE TO CONTINUE PAYING PIP BENEFITS

CARYN GORDON² - CONTRIBUTOR

In *Sindler v Farmers Insurance Exchange*, No 282678 (Mich App March 31, 2009), the Court of Appeals held that the plain language of the release of Plaintiff's tort claim did not create an affirmative duty on the part of Defendant to pay PIP benefits indefinitely to Plaintiff and, therefore, Defendant was not obligated to continue paying PIP benefits to the motorcycle operator since the motorcycle was uninsured at the time of the accident.

In *Sindler*, Plaintiff sustained injuries in a motorcycle/motor vehicle accident in 1986. Plaintiff was the owner and operator of the uninsured motorcycle at the time of the accident. The motor vehicle involved in the accident was insured under a no-fault policy issued by Defendant's predecessor, Maryland Casualty Company. Plaintiff initiated two claims arising from the accident— a first-party no-fault PIP benefits claim, and a third party bodily injury claim against the owner of the motor vehicle.

Plaintiff eventually settled his tort claim with Maryland Casualty for \$30,000 less than the policy limits. The release for his tort claim indicated that it was a full and final release of all claims "except claims for personal protection insurance benefits (Michigan No-Fault benefits) under MCL 500.3107."

Plaintiff continued to receive PIP benefits until 2006. At that time, Farmers notified Plaintiff that he was not entitled to any further PIP benefits because he did not have insurance on his motorcycle at the time of the accident. MCL 500.3103 requires the owner of a motorcycle to have insurance and MCL 500.3113(b) precludes a person from collecting PIP benefits for bodily injury if he did not carry the required insurance at the time of the accident. MCL 500.3113(b) took effect three months before Plaintiff's 1986 accident.

After receiving the denial letter, Plaintiff sued Defendant for breach of contract. Defendant counterclaimed for reimbursement for money it had paid in no-fault benefits over the preceding six years on a

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theory of unjust enrichment. The trial court denied Defendant's summary disposition motion concluding an issue of material fact existed regarding whether Defendant made a promise to continue to pay PIP benefits indefinitely. The trial court further found a question of fact regarding Defendant's restitution claim.

On appeal, the Court concluded that the release does not contractually obligate Defendant to continue paying PIP benefits to Plaintiff. The Court recognized that Plaintiff failed to identify any ambiguity in the release. The plain language of the release does not permit an interpretation that the settlement of the tort claim created an obligation on the part of Defendant to forever pay PIP benefits. The Court further recognized that while the release provides that Plaintiff is not barred from making a claim for PIP benefits, it does not guarantee that such benefits would be paid. Plaintiff's reliance of the correspondence between his attorney and Maryland Casualty was unavailing because extrinsic evidence cannot create a question of fact where the release is unambiguous. Ultimately, the Court held that the plain language of the release does not create an affirmative duty on the part of Defendant to pay PIP benefits indefinitely.

The Court, however, determined that Defendant was not entitled to restitution. The Court disagreed with Defendant's position that Plaintiff failed to demonstrate a change of position or detrimental reliance as a consequence of having received mistaken payments. The Court acknowledged Plaintiff's testimony that since the accident, he has been in constant contact with claims representatives of Defendant and its predecessors regarding payments and issues involving his on-going medical treatment and, thus, relied on Defendant to provide PIP benefits in obtaining on-going medical treatment. The Court further acknowledged that Plaintiff testified he would not have settled his third-party claim for less than the policy limits if he was not going to be entitled to ongoing PIP coverage. Considering this record, the Court granted summary disposition in favor of Plaintiff on Defendant's counterclaim.

In short, the plain language of the release does not contractually obligate Defendant to continue paying PIP benefits to Plaintiff and, therefore, Plaintiff is no longer entitled to PIP benefits. Defendant, however, is not entitled to restitution because the record demonstrated that Plaintiff relied on the mistaken payments.

Garan Lucow Miller handled this appeal for Farmers Insurance Exchange.

APPELLATE COURT APPLIES *IQBAL* HOLDING

EMILY LEE PARTRIDGE³- CONTRIBUTOR

In *Fenton v Farm Bureau*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 2009 (Docket No. 279673), the Plaintiff, Mark Fenton, was struck by a train while crossing railroad tracks in a 1987 Oldsmobile Ninety-Eight. The Oldsmobile was titled to his sister, Cathleen Fenton. Plaintiff's sister had purchased a no-fault insurance policy for the Oldsmobile from Farm Bureau. The trial court granted Farm

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Bureau's summary disposition motion, holding that the Plaintiff was precluded from PIP benefits because he did not independently insure the vehicle. The Court of Appeals reversed.

First, the appellate court noted that the Plaintiff was indeed a constructive or de facto owner of the Oldsmobile as he had unlimited use of the vehicle, had paid for repairs on it, and had used it to travel between Traverse City and Detroit for work. Also, there was a purchase agreement wherein the sale would be completed within 30 days. The appellate court found that the Plaintiff had the "right to use" the vehicle for more than 30 days and that he had proprietary or possessory use of it, as opposed to mere incidental usage under the direction or with the permission of another.

Second, the appellate court noted that although there can be more than one owner of the vehicle for the purposes of the Michigan No-Fault Act, *Iqbal v Bristol West*, 278 Mich App 31 (2008) has held that where one owner secures a no-fault insurance policy under MCL 500.3101(1), a second uninsured owner will not be precluded from PIP benefits pursuant to MCL 500.3113(b). Thus, the Plaintiff, despite being an uninsured constructive owner of a vehicle, was still entitled to PIP benefits because his sister had insured the vehicle.

GARAN LUCOW MILLER
GRAND RAPIDS SPRING BREAKFAST SEMINAR
April 16, 2009 at Frederik Meijer Gardens and Sculpture Park

8:00 - 8:25 am	Registration and Continental Breakfast
8:25 - 8:30 am	Welcome and Introduction David N. Campos
8:30 - 8:55 am	Special Needs Trusts *Qualifying for Government Benefits; *How Does the Special Needs Trust Fit In? *Who Should Serve as Trustee? *Tax Treatments Speaker: Tara L. Velting
8:55 - 9:30 am	The SCHIP Extension Act - What it Really Means for Insurance Carriers Throughout the Country *3/16/09 User Guide and What it Really Means; *Keys to Proper Registration & Program Establishment; *Reporting 12/5/80 Claims Forward - Made Easy By Medicare's Query Input and Response Files? Speaker: Lori A. Ittner
9:30 - 9:50 am	Other Avenues for Administrative Remedies In Employment Law *EEOC Employment Actions; *State Counterpart to EEOC - Michigan Department Of Civil Rights; *Exhaustion of All Administrative Remedies Speaker: Kelly M. Kluting
9:50 - 10:05 am	Break

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- 10:05 - 10:35 am **Using Internet Social Networking Sites as a Discovery Tool**
 *Investigation of FaceBook, MySpace, Blogs, and Other Internet Sources
 For Discovery Purposes _____
 Speaker: **David A. Couch**
- 10:35 - 11:05 am **How Far Do Friend of the Court Liens Reach?**
 *Third Party Automobile Negligence Suits; *Compensation Under a Workers' Compensation Order or Settlement; *First Party No-Fault Benefits: Work Loss, Replacement Services and Medical.
 Speaker: **Ann M. Stuursma**
- 11:05 - 11:50 am **Michigan Auto No-Fault First Party Update**
 *Amended Definition of Motor Vehicles/ORV's: §3101(2)(e) & (g); *MCCA Claims: USF&G v MCCA; *§3105 "Arising Out Of": Willer v Titan; *§3105 "Accidental Bodily Injury": Scott v State Farm; *Room and Board: Hoover v Michigan Mutual; *Ownership & Exclusions: Auxier v Nationwide & Roberts v Titan; *Property Protection Benefits: MDOT v Initial Transport; IME's & Duty of Insurers: Moore v Secura.
 Speaker: **David N. Campos**
- 11:50 am - Noon Question and Answer Session

The Grand Rapids office of Garan Lucow Miller P.C. is pleased to present its Annual Spring Breakfast Seminar on **April 16, 2009** at the **Frederik Meijer Gardens and Sculpture Park**, located at 1000 East Beltline, NE in Grand Rapids {(616) 957-1580}. The day will begin with a continental breakfast from **8:00 - 8:25 am**, followed by the seminar. Comprehensive written materials will be distributed to all program attendees. After the seminar, feel free to **enjoy all of the open indoor garden areas** as our guest!

If you are able to attend this **complimentary** annual event, please register via e-mail to: lbeatty@garanlucow.com or phone Lynn Beatty at **(616) 742-5500** or **(800) 494-6312** for reservations. We look forward to seeing you!

**GARAN LUCOW MILLER
 GRAND BLANC SEMINAR
 April 23, 2009 at Baker College of Flint**

- 8:00 - 8:30 a.m. Registration and Continental Breakfast
- 8:30 - 9:15 a.m. **So You Want to Sue? Or You Have Been Sued? What You Need Know.**
 Speaker: **William Brickley**
- 9:15 - 10:00 a.m. **Protecting Creative Business Property**
 *Trademarks, logos, designs, artists' works
 Speaker: **Robert Goldstein and Jennifer Bruening**
- 10:00 - 10:10 a.m. Break
- 10:10 - 10:50 a.m. **Workplace Injuries and Workers' Compensation**

*Defending your organization

Speaker: **Michael DePolo**

10:50 - 11:30 a.m.

The Ins And Outs of Business Succession Planning

Speaker: **Bennet Bush**

11:30 - 12:00 noon

Closing Remarks, Questions and Answers

The Grand Blanc office of Garan Lucow Miller, P.C. is pleased to present its Law and Order - Protecting Your Business and Yourself Seminar on **April 23, 2009** at **Baker College of Flint**, Technology Center, Room S-130, located at 1050 West Bristol Road, Flint, Michigan 48507. The day will begin with a continental breakfast from 8:00 a.m. - 8:30 a.m., followed by the seminar. Comprehensive written materials will be distributed to all program attendees. To register, contact Lisa Boulis via email at lboulis@garanlucow.com or by phone at (810) 695-3700.

FALL BREAKFAST SEMINAR

Mark your calendar for the Firm's Fall Breakfast Seminar which will be held at the Troy Marriott Hotel on Thursday November 5, 2009. **Watch Law Fax for further details.**

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