THE INTRODUCTION OF MEDICAID’S “SUPER LIEN” AND OTHER RECOVERY EFFORTS

By Nicholas Bobb and Zachary Pyers

In recent years, it has been impossible for attorneys involved in personal injury claims to avoid the changing landscape concerning Medicare’s “Super Liens” and the need to account for Medicare’s interest for future medical payments when resolving claims. With federal and state legislatures taking additional steps to ensure that government funds are properly utilized, we have seen the implementation of mechanisms to recover Medicaid funds when there is a third-party or other entity who should have been the primary payer for such medical expenses.

The Medicaid Secondary Payer Program

In December 2013, Congress passed the Bipartisan Budget Act of 2013 amending 42 U.S.C. 1396a(a) and effectively creating the Medicaid Secondary Payer Program. This program, described below, was initially set to take effect on October 1, 2014. However, on March 31, 2014, Congress passed a Bill that delays the implementation of the Medicaid Secondary Payer Program until October 1, 2016. This delay gives states an additional two years to evaluate and implement the Medicaid Secondary Payer Program.

Under 42 U.S.C. 1396a(a), as amended by the Bipartisan Budget Act of 2013, as a condition to receiving Medicaid funds each state is required to create a Medicaid Secondary Payer Program. These programs must take all reasonable steps to identify cases where Medicaid may be a “secondary payer.” Medicaid is a secondary payer when it covers services rendered in response to an injury for which a third party is liable.

In addition to identifying cases where Medicaid may be a secondary payer, each state’s plan must contain a secondary payer recovery component where the state takes all necessary actions to enforce its rights against liable third parties. When a state identifies a primary payer other than Medicaid, it must return money coming from the primary payer to the federal government. 42 U.S.C. 1496b(d)(2)(A)-(C). To ensure compliance, the federal government treats these amounts as “overpayments” and reduces subsequent Medicaid payments to the states accordingly.

In response to the secondary payer requirement, several states are enacting legislation to ensure compliance. Rhode Island, for example, enacted Gen.Laws 1956 § 27-57.1-1 entitled “Interception of insurance payments.” This legislation creates what Rhode Island calls a Medical Assistance Intercept System. Any insurer doing business within the state is required to participate in the program. MAIS electronically matches Rhode Island Medicaid recipients with liability and workers’ compensation insurance claims. Insurance companies and attorneys have the option of doing a data match through the Insurance Services Office (ISO) ClaimSearch or utilizing the MAIS interactive lookup system. MAIS is designed to intercept payments of $500 or more for reimbursement to the State of Rhode Island’s Medicaid Program. If the claimant receives Medicaid, the insurer must forward payment to Rhode Island’s Office of Health and Human Services for Medicaid’s portion of the bill, with the balance being sent to the claimant. In addition, Rhode Island requires parties settling personal injury or workers’ compensation claims to report settlements to the state for secondary payer purposes.

Other states have taken steps to implement Third Party Payor compliance too. In 2012, Vermont passed legislation that requires insurers to take “reasonable steps” to determine whether Medicaid is a secondary payer. In 2013, West Virginia passed a bill that provided an assignment of rights to the Department of Health and Human Resources to recover for medical expenses paid on the Medicaid beneficiary’s behalf from any third party.

Based upon the increased pressure to recover Medicaid funds, it is anticipated that other states, including Ohio, will take steps similar to Rhode Island, Vermont and West Virginia to recover these Medicaid payments.

The Medicaid Super Lien

In addition to the implementation of the Secondary Payer Program, Medicaid was dramatically expanded under the Affordable Care Act. This expansion means that the number of beneficiaries, and necessarily the amount of federal and state dollars spent covering these beneficiaries, has dramatically increased. This increase in part led to the passage of the Bipartisan Budget Act of 2013 and certain amendments to Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)). Specifically, the Bipartisan Budget Act of 2013 strikes the phrase “payment by any other party for such health care items or services” and replaces it with “any payments by such third party.” Additionally, Section 1912(a)(1)(A) of the Social Security Act (42 U.S.C. 1396k(a)(1)(A)) was amended by striking the phrase “payment for medical care from any third party” and replacing it with “any payment from a third party that has a legal liability to pay for care and services available under the plan.” These legislative changes effectively expand the portion of settlement proceeds from which Medicaid can seek recovery for its lien. Previously, Medicaid was only permitted to recover funds from the portion of a settlement, judgment or award that represented compensation for medical expenses. Once these amendments take effect, Medicaid can seek recovery from the entire amount of any settlement, judgment or award.

These legislative changes were also largely seen as a reaction to the recent U.S. Supreme Court’s decision in Wos v. E.M.A. ex rel. Johnson, 133 S.Ct. 1391 (2013),¹ that struck down a North Carolina statute. The Court concluded that North Carolina’s statutory scheme for Medicaid lien recovery from judgments, settlements, or awards was improper because it allowed the state to recover money from judgments, settlements and awards, that did not constitute reimbursement for medical expenses. These recent changes under the Affordable Care Act do two things for the Medicaid liens that were prevented by the Court’s ruling in
First, by removing the reference to “health care items and services” when describing a state’s right to recovery for benefits paid on behalf of a Medicaid beneficiary and replacing it with “any such payment by a third party,” the new law effectively removes the limitation on state Medicaid to recover from only that portion of a settlement or award that was related to medical expenses. As such, Medicaid recovery now applies to the total amount of a judgment, settlement or award, including awards for lost wages and pain and suffering.

Second, the bill removes the language limiting the state’s right of assignment for any payment made by a third party. By removing the language “to the extent of such legal liability,” the bill extends a state’s right of recovery beyond medical items and services Medicaid may have paid for. Thus, effective October 1, 2016, Medicaid will be empowered to recover its lien based upon the total amount of the settlement or award as opposed to only that portion of the settlement or award that had been determined to include past medical care. However, until this amendment takes effect, practitioners should follow Arkansas Dep’t of Health & Human Servs. v. Ahlborn (2006) and its progeny.

**Medicaid Moving Forward**

Both the Secondary Payer Program and the Medicaid “Super Lien” are working to reshape the landscape of personal injury litigation and settlement. States are now arming themselves with tools that allow them to identify situations in which they are likely to have “Super Lien” status and to recover their liens from a larger portion of any settlement, judgment or award. Because these programs are still in their infancy, and not all states have utilized these provisions, it is impossible to predict what their effect will ultimately be on personal injury litigation here in Ohio. What is not difficult to predict is that these programs will make litigation more complicated for the attorneys involved.

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1. The effects of the Wos opinion were discussed in the 2014 Winter Edition of the Columbus Bar Association Lawyers Quarterly, entitled “Is Ohio’s Medicaid Right Of Recovery Statute Preempted By Federal Law?”

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**“I’ve learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.”**

— Maya Angelou

Maya Angelou passed away on May 28, 2014. She left a legacy of words and work that inspired generations. She was not a college graduate or an attorney. She was called “Doctor” by virtue of her numerous honorary doctorate degrees. She was, however, a journalist, a professor, a poet, an author, a mother, and a phenomenal woman.

A high school dropout, Maya returned to school to earn her diploma just before the birth of her son. She travelled through the United States and Europe working as a dancer and actress. During her time in Egypt and Ghana, she honed her skills as a writer and published “I Know Why the Caged Bird Sings” in 1969. The critically acclaimed book was the first in a series that told of her adventures, failures, and accomplishments. She was a beacon of female achievement and perseverance to girls and women throughout the world. Her candid and captivating autobiographies gave young girls hope to survive and showed them they could accomplish anything through hard work and determination.

I started reading her books between the ages of ten and twelve. I found her storytelling fascinating. The words and pace were simple yet she said so much on each page. Twice – once in high school and again in college – I had the opportunity to attend events where she was the keynote speaker. Her voice was strong, her tone even and measured. Her words resonate with me today.

The quote above is something we should remember in both our personal and professional interactions. Our clients will not always remember the instructions we give, but they will remember that we listened respectfully as they told their stories. Our families might forget the funny quotes from the birthday cards we send. They will never forget the love they feel in our presence.

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