



Settlement Language and Conditional Payment Reimbursement Obligations

Settlement negotiations oftentimes overlook the logistics of the parties' Medicare conditional payment reimbursement agreement. More often than not, the party drafting the contract, will use general boiler plate releases that pertain to all liens. It is only after the settlement documents have been executed and a demand for payment of the settlement funds made, that the manner of the reimbursement becomes an issue. Further complications may arise from confusion regarding the proper venue for the resolution of these disputes. Two recent Medicare Secondary Payer compliance cases highlight these issues and will be reviewed.

In *Karpinski v. Smitty's Bar, Inc.*, 2016 Cal. App. LEXIS 277 (April 12, 2016), the California Appellate Court considered Karpinski's motion to enforce the parties' settlement agreement pursuant to Section 664.6 of the California Code of Civil Procedure. The underlying settlement agreement stemmed from Karpinski's negligence action against Smitty's bar for allowing two intoxicated men to enter and remain in the bar. Karpinski also had an assault and battery action against these two men for the injuries that he sustained during their attack. Karpinski's assault related medical bills were paid by Medicare. He also received crime victim compensation payments from the State of California.

Karpinski agreed to dismiss and release all claims against Smitty's Bar in exchange for the sum of \$40,000. The terms of the settlement agreement also called for Karpinski to "negotiate, satisfy, and dispose of all liens...which are now known, including but not limited to the lien asserted by the State of California, as well as any other lien claims which may hereafter be asserted." Karpinski further agreed to "indemnify and hold harmless (Smitty's), its attorneys and its insurance carrier...with respect to all past, present, and future lien claims." The agreement had similar indemnification and hold harmless language that pertained to Medicare reimbursement claims brought against Smitty's, its attorneys, and its insurance carrier.

Although the formal settlement agreement and release was signed on May 5, 2014, Smitty's held off on making payment of the \$40,000. On July 22, 2014, Karpinski filed a motion for entry of judgment pursuant to the settlement agreement. Smitty's objected to the motion arguing that Medicare and the State of California had liens on the settlement amount. It also argued that satisfaction of the liens was a statutory and contractual condition precedent to payment of the settlement funds. Smitty's offered to make immediate payment of the settlement amount as long as Karpinski would accept a check that included the names of both lien holders. The trial court granted Karpinski's motion to enforce the settlement agreement on September 2, 2014. It also awarded Karpinski attorney fees.



In considering Smitty's appeal of the trial court's order, the Appellate Court reviewed the two alleged statutory liens referenced in the settlement terms. In reviewing the Government Code section 13963, that pertains to the California Victims of Crime program, the Court noted that a lien only attaches to the judgment "on the application" of the California Victims of Crime Board. Although Karpinski had complied with the Government Code's requirement that notice be given to the Board of any action filed that pertained to the crime, the Court found no evidence that the Board made any application to the trial court to allow a lien on the settlement. It also noted that there was no evidence that the Board had attempted to recover their payments in a separate action or to intervene in the underlying action in order to "perfect and satisfy the lien." (Gov. Code, Sections 13963, subd. (d)) In light of this, the Court found that the Board's lien was not a statutory condition precedent.

The Medicare Secondary Payer Act was also examined by the Court. Although Medicare has a right to seek payment from a primary payer, should the beneficiary fail to reimburse Medicare, there were no California cases that found the reimbursement of Medicare's conditional payments to be a statutory condition precedent to the disbursement of the settlement funds. The Court noted that in a similar case, *Hearn v Dollar Rent A Car, Inc.* (GA.Ct. App 2012,) 726 S.E.2d 661, the *Hearn* court concluded that public policy is not thwarted by a court's enforcement of a settlement that does not include Medicare as a co-payee on a check where the plaintiff assumed responsibility for reimbursement and agreed to indemnify the parties. The *Zaleppa v Seiwel* [(Pa. Super.Ct 2010) 9 A.3d 632] case was also cited as support for the proposition that absent express authorization, private parties may not assert the interest of the government in a post-trial motion or any phase of litigation.

In reviewing the terms of the settlement agreement, the Court noted that nothing in the settlement terms made repayment of the liens, a contractual condition precedent to Smitty's obligation to pay the settlement funds. The terms of the contract required Karpinski to honor his obligations pertaining to the liens and also provided a remedy should he fail to honor the obligations. Had there been an agreement to reimburse the liens prior to disbursement of the funds or to add the lien holders to the settlement check, these requirements should have been set forth in the settlement terms. The Appellate Court affirmed the trial court's judgment and awarded costs on appeal to Karpinski.

The *Mikiewicz v Hamorski and Erie Insurance Exchange* (2016 U.S. Dist. LEXIS 58859 (May 3, 2016) case similarly involved a motion to enforce a settlement agreement between the parties. The agreement however was contingent upon the satisfaction of certain conditions precedent in order to receive the settlement funds. One of the conditions pertained to the reimbursement of Medicare's conditional payments. A dispute arose as to the proper venue for the hearing on the motion to enforce the settlement agreement.

The settlement agreement was entered into in connection with the resolution of a personal injury claim that was filed in the Lackawanna County Court of Common Pleas. Mikiewicz filed a motion to enforce the agreement in the Lackawanna Court due to Erie Insurance's failure to pay the settlement funds. Erie Insurance moved to remove the case to the United States District Court for the Middle District of



Pennsylvania arguing that federal jurisdiction was appropriate since the claim involved the Medicare Secondary Payer Act (MSPA). Mikiewicz moved to remand the action back to the Lackawanna County Court.

In remanding the action back to the Lackawanna County Court, Judge Mariani found Erie's actions "objectively unreasonable." Although federal jurisdiction is proper when the civil action "arises under" federal law, the federal question must be presented on the face of the plaintiff's "well-pleaded complaint." In this case, Erie's argument that federal jurisdiction exists since the underlying motion to enforce the settlement agreement involves the federal MSPA did not, in and of itself, provide a basis for removal. In addition, the existence of a federal defense to Mikiewicz' motion to enforce the agreement does not allow for removal of a case to a federal court.

Judge Mariani also rejected Erie's argument that the MSPA "triggers the complete pre-emption doctrine" because the interpretation of the MSPA would have a nationwide impact on the obligations of all parties involved in civil litigation that include a conditional payment reimbursement claim by Medicare. In analyzing this argument, Judge Mariani noted that "the complete pre-emption doctrine, a corollary to the well-pleaded complaint rule, provides that in certain limited circumstances, the pre-emptive force of a statute is so 'extraordinary' that it converts an ordinary state common-law complaint into stating a federal claim for purposes of the well-pleaded complaint rule." Since Erie failed to cite any support for the claim that the MSPA is so "extraordinary" that it completely preempts state law, Judge Mariani instead reviewed several cases within the Circuit that were on point. Based upon his review, there was nothing in the MSPA or the Medicare statute that demonstrated that the MSPA completely pre-empts state law. In awarding the Plaintiff expenses, costs and attorney's fees in connection with the improper removal, Judge Mariani specifically took note that Erie has been repeatedly sanctioned in the past for making similar unsuccessful arguments in regards to the MSPA.

The *Karpinski* and *Mikiewicz* cases both illustrate the types of conditional payment issues that may arise after a settlement agreement has been reached. Rather than relying on boilerplate releases, each party to the settlement should have a clear understanding of their respective obligations when it comes to negotiating and satisfying the liens in the case. Conditional payment reimbursement as a condition precedent to the payment of the settlement may be negotiated as a term of the agreement. Alternatives may also include the parties' agreement to hold a portion of the settlement funds in escrow while the conditional payment issues are being resolved. The additional attention to the conditional payment details during settlement negotiations is well worth the effort.

Rasa Fumagalli JD, MSCC