



HARO V. SEBELIUS: ARIZONA COURT TELLS MEDICARE TO RE-TOOL ITS RECOVERY REQUESTS

The recently announced decision in the closely watched case, *Haro v Sebelius*, has the potential for changing -- and some would say restraining -- Medicare's recovery practices targeted at beneficiaries and their counsel, under the Medicare Secondary Payer Act.

In a dispute between Medicare beneficiaries (and their lawyers) and Medicare, over the procedures and tactics Medicare uses to demand reimbursement from the proceeds of liability settlements and jury awards under the Medicare Secondary Payer (MSP) provisions, the District Court of Arizona (i) entered summary judgment in favor of the beneficiaries and lawyers, (ii) enjoined Medicare from engaging in threatening demands for repayment that go beyond Medicare's statutory authority, and (iii) certified a class action. *Haro v Sebelius*, (D. Arizona May 5, 2011), No. 4:09-cv-00134-DCB.

SCOPE OF RULING

The focus of this dispute, and the court's order, is on Medicare's collection practices when it demands prompt repayment from Medicare beneficiaries (and their lawyers) even before the final amount due has been fully established.

The court found that CMS has been too heavy-handed in seeking reimbursement from Medicare beneficiaries, and from plaintiffs' attorneys, particularly in those instances when

beneficiaries have exercised their right to seek a waiver or appeal of the reimbursement claim. Therefore, the court has enjoined Medicare from "demanding payment of a MSP reimbursement claim with threats of commencing collection actions before there is a resolution of an appeal or waiver request."

As for plaintiff attorneys, Medicare is also being "enjoined from demanding that attorneys withhold liability proceeds from their client's pending payment of disputed MSP reimbursement claims." The court noted that plaintiff's attorneys have other incentives, especially those imposed by the state Code of Professional Responsibility, to do the right thing and not pay out to their clients amounts that are properly due to a third party, such as Medicare.

AFFIRMANCE OF MSP; NO IMPACT ON SECTION 111 REPORTING

This decision does not call for Medicare to suspend its payment or recovery operations. To the contrary, this decision affirms the statutory framework for the MSP, but in doing so, cautions Medicare to abide by the statute and the statutory enforcement tools available to Medicare to ensure compliance with the recovery/recoupment obligations imposed on beneficiaries, attorneys, and "primary payers." Nor will this decision impact the Section 111 reporting of liability payments scheduled to start in October 2011.

MEDICARE RECOVERY PRACTICES ARE DELAYED WHILE CHANGES UNDERWAY

According to the Arizona District Court, Medicare needs to reign in its collection processes and bring them in line with statutory authority. In reading the opinion, it's obvious that Medicare has already made some program changes in response to the allegations made by the plaintiffs. The Court noted some of those changes but observed that they did not go far enough to satisfy the court.

In the wake of the *Haro* decision, Medicare had to revise the communications it sends to beneficiaries and attorneys (letters, as well as website postings) to make clear that if the beneficiary disputes the reimbursement demand, repayment will not be due until any appeal/waiver is resolved. A revised Rights and Responsibilities Letter is now available; the revised Final Demand Letter is still under review and Medicare's Recovery Contractor has temporarily suspended the issuance of Final Demand Letters until this review process is completed (visit www.msprc.info for the latest updates).

LIABILITY PAYERS: RECOVERY SOURCE OF LAST RESORT?

If there is anything disquieting in this opinion, it's the repeated references to the fact that liability payers [i.e. insurance companies, self-insured entities] are viewed as the ultimate entity available for repaying Medicare when no one else does. More than once, the District Court speaks almost reassuringly that Medicare can seek "double damages" from the "primary payers": "if the beneficiary or other party...does not reimburse Medicare, the third party payer must reimburse Medicare even though it has already [paid] the beneficiary."

This opinion underscores the defendant's interest, and indeed obligation, to make sure that Medicare gets properly and timely reimbursed. When negotiating settlements with plaintiffs, defendants can use this opinion to insist on a protocol that provides prompt and direct repayment to Medicare of amounts that are not in dispute.

AHEAD:

The next monthly CMS Town Hall call will take place on Wednesday June 29. In the meantime, Tucker Ellis & West LLP will continue to monitor the CMS websites for any indication of change to its recovery policies or practices.

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