**Hospital Liens, Medicare and Medicaid: Trouble Ahead?**

Several years ago I was informed by an attorney that Danbury Hospital had put a lien on the liability carrier of his clients claim. He had looked into it and found that, not only were they able to do so but, they had Connecticut General Statutes to support their position. We discussed the potential dire consequences of the implementation of this approach on a broad scale and were grateful that it was only being used by a hospital outside of our geographic region. Well, over the past year or so we are seeing hospitals all across the State beginning the same practice. This will certainly challenge all of us in the future. This is further complicated by the language in the Medicare and Medicaid regulations which will potentially lead to even more problems ahead. In this newsletter I will review what I have learned so far.

Connecticut General Statute 49-73 allows hospitals to (a) lien the proceeds of any accident and liability insurance policy for the actual costs and materials provided. (b) Instruct the liability carrier to pay directly to the hospital the amount due (so long as all parties agree). What does this mean in practice? Well, if the Hospital or its agent discovers who the liability carrier is, they can place a lien on the file that directs the liability carrier to pay them the full amount billed, before you or your clients receive the settlement proceeds. If for example, a case settles for $20,000 with a perfected hospital lien for $9,000, your office would receive a check for $11,000 which would be used for your fee, all remaining costs and specials. The remaining balance would be for the client.

Obviously, the hospital’s position ahead of everyone is problematic and raises a whole list of other questions. Is the attorney entitled to their contingency fee on the entire settlement amount or the proceeds that are forwarded to them after the hospital is paid? Are attorneys informed ahead of time of the placement of the lien so they can take that into consideration when settling the claim and determining the value of the case? Do the hospital fees represent the usual, customary and reasonable fees that commercial carriers usually pay them for their services or are they inflated fees that are used solely for the purpose of cost shifting to payers that are foolish enough to pay the fee unchallenged?

Let’s face it, while a hospital may charge $15 for an aspirin, we all know that it’s worth pennies on the open market. Hospitals often charge 5-10x the insurance reimbursed fee for operating room facilities knowing that the fees will never be paid at full fee by anyone (until now?). The same goes with surgical and non-surgical providers who bill multiples of the fees they are actually reimbursed in the hope of getting paid a reasonable fee by commercial carriers. The difference now is that, unlike doctors, hospitals have no incentive to negotiate fees with the attorney. With the application of CGS 49-73 they move to the top of the food chain. This elevated position puts everyone downstream in an untenable position.

You may be thinking that this will only be problematic for your uninsured patients because commercial carriers, Medicare and Medicaid are fee scheduled and therefore not subject to the ridiculously inflated fees charged by the hospitals. While that MAY be the case for commercial carriers (depending on the language of the specific contract), it is absolutely not the case for Medicare and Medicaid.

The Center for Medicare and Medicaid Services, Deficit Reduction Act, states that “*By law, the Medicaid program is the payer of last resort. If another insurer or program has the responsibility to pay for medical costs incurred by a Medicaid-eligible individual, that entity is generally required to pay all or part of the cost of the claim* ***prior*** *to Medicaid making any payment. This is known as “third party liability” or TPL. Third parties that may be liable to pay for services include private health insurance, Medicare, employer-sponsored health insurance,* ***settlements from a liability insurer****, workers' compensation, long-term care insurance, and other State and Federal programs (unless specifically excluded by Federal statute). Third party payers are not responsible for reimbursing Medicaid for any services that are not covered under the Medicaid State plan*” (**bold** added). Clearly, this indicates that if there is a case on a Medicaid insured plaintiff then the Medicaid providers (hospitals, doctors, therapists) have an obligation (perhaps an option?) to bill the third parties, which by their definition includes the liability carrier. Obviously, the hospital, now aware their State lien statute would rather be paid many multiples the Medicaid rate and would have no problem following this regulation.

What about Medicare? I have been given copies of collection letters sent to Connecticut attorneys on this topic. These letters reference the Medicare Secondary Payer Manual, Ch.2 §60 which refers to No-Fault payments. Since it was related to No-Fault claims and Connecticut is not a No-Fault State my initial impression was that it would not apply in Connecticut. Unfortunately, upon further reading of the Medicare Secondary Payer Manual, Ch.2, I came across §40 and §40-2. These two sections read as follows:

*“§40 - Liability Insurance (Rev. 49, Issued: 04-07-06; Effective/Implementation: 05-08-06) Under §1862(b)(2) of the Act, (42 U.S.C. 1395y(b)(1)),* ***Medicare does not make payment for covered items or services to the extent that payment has been made, or can reasonably be expected to be made under a liability insurance policy or plan*** *(including a self-insured plan)….”*

The Manual goes on to explain:

*“§40.2 - Billing in MSP Liability Insurance Situations (Rev. 49, Issued: 04-07-06; Effective/Implementation: 05-08-06)*

*A – Intentionally omitted.*

*B – Billing Options and Requirements – Alternative Billing. Generally, providers, physicians, and other suppliers must bill liability insurance prior to the expiration of the promptly period rather than bill Medicare. (****The filing of an acceptable lien against a beneficiary’s liability insurance settlement is considered billing the liability insurance****.) …”*

So it appears that your uninsured clients, as well as Medicare and Medicaid insured clients, who go to the Hospital may have an enforceable lien placed against their settlement or verdict proceeds. With that in mind, attorneys should consider and advise clients of the financial risks they are taking when going to a hospital emergency department for routine medical services that can otherwise be provided by a non-hospital based provider. Avoiding the hospital emergency department in cases of non-emergent and non-life threatening injuries will likely allow your clients to receive appropriate medical care in an outpatient setting that is equal to or perhaps even better then the care available in an emergency department setting. It certainly protects them from abusive and unreasonable fees which the hospital will likely not be willing to negotiate.

You should know that the hospital lien is only enforceable against the liability carrier and not your client. I have been told that on some instances the lien holder has sent a copy of the lien to the client’s attorney. While it is possible that this is done as a courtesy, it is equally possible that they do it in the hope that the attorney may interpret it as a lien that he or his client is obligated to pay. It is my understanding that this in not the case.

I have downloaded some of these regulations, letters and statutes and posted them on my website along with this newsletter (<http://shawchiropractic.com/attorney/newsletters> ). These various statutes and regulations create more questions than answers. Of course, as a disclaimer, I am a doctor and not an attorney trained to read and interpret these regulations so I encourage each of you to read them on your own and make your own interpretation. In the mean time, we all must keep this in consideration before having our clients/patients receive medical services from a hospital when there may be, and usually will be, equal or better quality services available outside of the hospital system. Your feedback and comments are always welcome and appreciated. Dr.Shaw@ShawChiropractic.com