Defending Liberty Pursuing Justice

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Medicine and Law

Effie V. Bean Cozart

The law and legal issues related to medicine and health care financing are ever changing. In this issue of *TortSource*, the TIPS Medicine and Law Committee provides feature articles on three timely topics. Edward Beitz addresses the significance of punitive damages when only a small percentage of juries award punitive damages in medical negligence cases. Kevin Cottone explains what lawyers and insurers who are "responsible reporting entities" under recent federal legislation must do to determine whether a claimant is a Medicare beneficiary and the new obligations required of them as of January 2010. Louise Derevlany examines assisted outpatient treatment and its legal requirements and discusses how assisted outpatient treatment investigations will not be impeded by HIPAA.

This issue also includes a Trial Tip by Greg Cesarano about how a lawyer's courtroom behavior can affect the outcome of a trial, and an informative Legislative Update by Robert Ferm on the ongoing health care reform debate in Congress. Janine Smith tells us about the TIPS Law in Public Service Committee's gardening project at Josue Homes in San Diego; Marlene Heyser recaps the TIPS events at the Del from our fall meeting in Coronado, California; and Tony Cabassa provides a preview of San Juan, Puerto Rico, the venue for the Section's spring meeting. ❖

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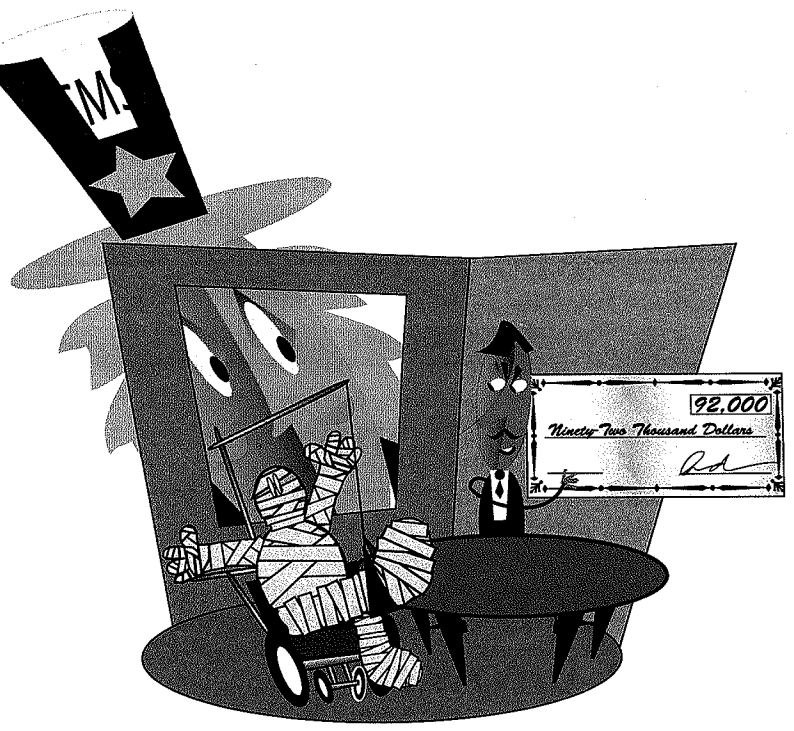

Illustration by Andrew O. Alcala

Punitive Damages in Medical Negligence Cases
The Bark versus the Bite

Edward F. Beitz

For attorneys who do not spend their billable day filing or responding to complaints for professional malpractice, the terms "punitive damages" and "health care" probably sound foreign to one another, and perhaps a little contradictory. After all, punitive damages are intended to punish and deter, to reform the defendant and dissuade the kind of behavior or actions that brought about the lawsuit. Typically, a claim for punitive damages is only presented to a jury when there is evidence of reckless and egregious behavior or intentional and wanton conduct: the kind of behavior that deserves harsher measures than the award of ordinary compensatory damages. Think of a chemical manufacturer that poisons a local river by illegal dumping or a pharmaceutical company that buries test results that may negatively impact the bottom line. The practice of medicine, on the other hand, is generally understood to be the science of healing and preventing disease. Doctors and nurses are looked to for help and assistance. For most people, doc-

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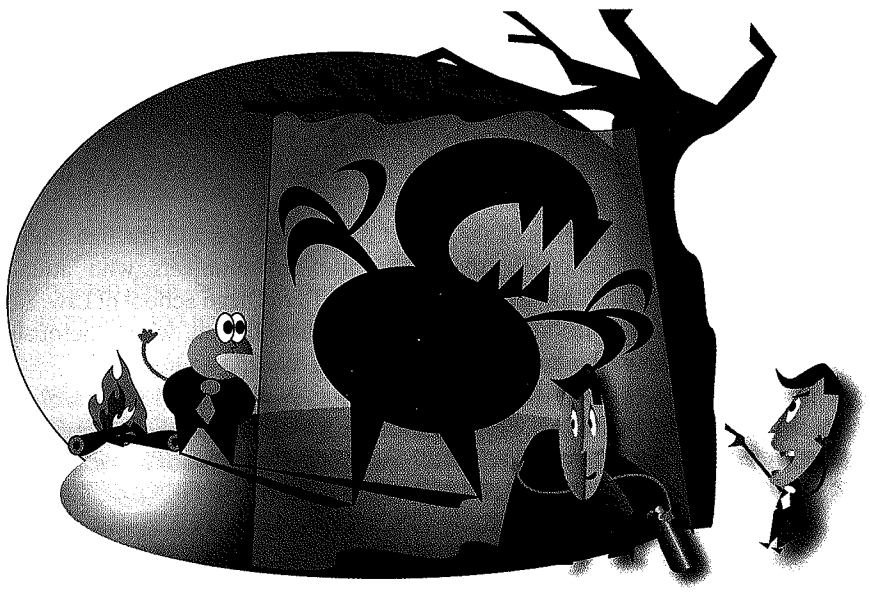

Illustration by Andrew O. Alcala

The New Medicare Act
Handling Medicare Claimants in the Future

Kevin C. Cottone

The Medicare, Medicaid and SCHIP Extension Act of 2007 represents a major effort by the U.S. Congress to protect the government's interest in personal injury claims involving Medicare beneficiaries. Simply stated, the purpose of the Act is to ensure that the federal government is repaid for the Medicare benefits paid on behalf of a beneficiary relating to a personal injury claim. Its impact is widespread, as the Act applies to insurers and self-insurers involved in any liability, no-fault, or workers' compensation claim. These insurers and self-insurers, referred to as responsible reporting entities (RREs) in the Act, must now determine whether a claimant is a Medicare beneficiary. If so, they must notify Medicare of the claim and, along with the claimant or plaintiff and his or her attorney, the RRE must ensure that Medicare's interest is protected at the time of judgment or settlement. The penalties under the Act for noncompliance are significant; they can include double

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The New Medicare Act: Handling Medicare Claimants in the Future

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damages and a $1,000 per day fine, applied separately to each claim.

A Heightened Diligence for All Involved

For defense attorneys, if your client is an RRE, you need to work with it to determine whether a claimant or plaintiff is a Medicare beneficiary at the earliest date possible. To do so, the RRE can ask the claimant, but it cannot solely rely on the claimant's response. The RRE has an independent obligation under the Act to check with the governmental agency that runs Medicare, the Centers for Medicare and Medicaid Services (CMS). To do so, the RRE must establish an electronic link with CMS. A cottage industry of subcontractors available to help establish the electronic reporting system for the insurers and self-insureds has been burgeoning. Thus, if you are an insurer or self-insurer and have not yet implemented a system, there are companies in place to assist you.

The RRE must secure a Social Security number for the claimant or plaintiff and then query CMS directly for verification. The query is done electronically. Even if the RRE learns at the outset of a claim that the claimant or plaintiff has not received Medicare benefits, it should still query CMS periodically for Medicare status throughout the course of the claim. Defense attorneys can assist with this process through routine, initial written discovery requests, which should now insist on a Social Security number, verification of any Medicare or public benefits status, and the amount of any benefit received. Attorneys should review any records received in litigation for any information suggesting Medicare status. It should also be a routine line of questioning at deposition.

The effective date for the obligation of RREs to report settlements or judgments involving Medicare beneficiaries is January 1, 2010. Thereafter, RREs will have to submit quarterly, electronic reports on all settlements or judgments involving claimants and plaintiffs who, as of the date of payment, were Medicare beneficiaries. RREs also have to report on non-Medicare beneficiaries where there are ongoing obligations to pay medical expenses that extend into the Medicare years.

Time Is of the Essence

Once on notice of the settlement or judgment, CMS will alert its Medicare secondary payer recovery contractor (MSPRC), who will then assemble data relating to the claim and issue interim statements and itemizations to the beneficiary. An RRE may obtain a copy of the statement from the MSPRC, but only upon the written consent of the beneficiary. The process of data collection and obtaining a statement from the MSPRC could take more than six months to complete. Thus, the parties should initiate this process at the earliest opportunity in the claim.

The parties should do so because several factors could influence the amount of the reimbursement. The initial demand from CMS may be incorrect; for example, it might include a claim for reimbursement for medical treatment unrelated to the claim. This would require protracted communications back and forth with the MSPRC until an agreed upon figure is reached. A beneficiary may also seek a reduction in the CMS demand through a hardship petition, although it is anticipated that such petitions will be disfavored. There is also the reduction in the lien amount made for "procurement costs," which are the fees a claimant or plaintiff pays to his or her attorney and the costs incurred in developing the claim. The dilemma confronting the RRE is that it is the beneficiary who is to supply the MSPRC the information regarding a proposed settlement and applicable litigation costs and attorney fees. Future dealings with Medicare will require a level of cooperation among the adverse litigants to a claim.

For those involved in insuring and defending actions, the more important question, and the concern leading into the future, is how to timely identify and address Medicare's interest when it comes time to settle the claim. Indeed, the prior common practice to include in a release a provision that a claimant is responsible for reimbursing Medicare will no longer protect an RRE from a later claim. Given the potential fines and liabilities under the Act, RREs must ensure that Medicare's interest is addressed while everyone is still seated at the settlement table. It is also no longer feasible to expect to settle a claim on the courthouse steps without knowing the full extent of Medicare's interest. For example, with catastrophic injury claims, Medicare's lien interest could exceed the settlement value of the claim, particularly if the claim involves questionable liability. Accordingly, the parties to a settlement must identify and consider the true extent of Medicare's interest at the outset of negotiations and include it as part of the consideration in the settlement or resolution of the claim. ❖

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Mark Your Calendar

Data Privacy Breaches and U.S. Data Security Laws: New Worries, New Laws, New Roles for Counsel
January 20, 2010, teleconference
(312-988-5597)

11th Annual Windstorm Insurance Conference
January 25–28, 2010, Jacksonville, FL
(312-988-5672)

Fidelity and Surety Law Committee Midwinter Meeting
January 26–29, 2010
San Francisco, CA
(312-988-5672)

Obtaining and Retaining a Diverse Judiciary
(in conjunction with ABA Midyear Meeting)
February 3, 2010, Orlando FL
(312-988-5672)

ABA Midyear Meeting
February 5–7, 2010, Orlando, FL
(312-988-5672)

18th Annual Insurance Coverage Litigation Committee Midyear Meeting
February 25–28, 2010, Phoenix, AZ
(312-988-5672)

UIA Winter Seminar: The Pitfalls of Cross Border Joint Ventures Transaction and Litigation Risks
February 27–March 6, 2010, Salt Lake City, UT
(312-988-5672)

TIPS/LEL Joint 2010 Workers' Compensation Midwinter Conference
March 4–6, 2010, Phoenix, AZ
(312-988-5708)

Emerging Issues in Motor Vehicle Litigation
April 8–9, 2010, Phoenix, AZ
(312-988-5708)

19th Annual Toxic Torts & Environmental Law Committee Spring Meeting
April 9–10, 2010, Phoenix, AZ
(312-988-5672)

TIPS/ABOTA National Trial Academy
April 17–21, 2009, Reno, NV
(312-988-5656)

Property Insurance Law Committee Spring Meeting
April 29–May 2, 2010
Half Moon Bay, CA
(312-988-5672)

Fidelity & Surety Law Committee Spring Meeting
May 6–7, 2010, New Orleans, LA
(312-988-5708)

TIPS Spring Leadership Meeting
May 12–16, 2010, San Juan, PR
(312-988-5672) ❖