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BALANCE BILLING

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There is a significant difference on the issue of balance billing between the Medicaid program and the Medicare program.

1. *Medicaid.* Medicaid reimbursement rates are very low and as a result it is often difficult to obtain services because providers refuse to accept Medicaid. It is not possible for the patient to pay the difference between the private pay rate and the Medicaid pay rate. This is known as balance billing. Medicaid participating providers must accept the Medicaid payment as "payment in full."[1] This means that providers accepting Medicaid waive their right to bill Medicaid beneficiaries for any amounts over the Medicaid payment.

Several states have refused to allow providers to assert liens against Medicaid beneficiaries where there is clear third party liability and the Medicaid beneficiary has obtained a significant tort recovery.

In Illinois,[2] the hospital brought an action against the Medicaid agency to allow it to refund the Medicaid reimbursement so that it could sue the Medicaid beneficiary who had obtained a substantial tort judgment. The Seventh Circuit held that the hospital could not refund the Medicaid payment to the Medicaid agency and sue the Medicaid beneficiary. The Court noted, "Medicaid is a payer of last resort." The state can seek reimbursement from third parties, but private providers may not.

[1] 42 U.S.C. §1396a(a)(25)(c); 42 C.F.R. §447.15; 42 U.S.C. §1320a-7b(d) .
[2] Evanston Hospital v. Hauck, 1 F.3d 540 (7th Cir. 1993).

In a similar case in Florida,[3] the hospital placed a lien on the settlement award, but the court held that when a Medicaid patient obtains a tort recovery in excess of the medical expenditures paid by Medicaid, that recovery is meant to go to the injured party, not the provider. A similar result was reached in another Florida case.[4]

A federal appellate court has found that a hospital's lien on the proceeds of a malpractice settlement was invalid and unenforceable because the hospital had already accepted Medicaid payments for the care provided to the patient.[5] "By accepting Medicaid payments, Spectrum waived its right to its customary fee for services provided to Bowling..." "Although Medicaid rates are typically lower than a service provider's customary fees, medical service providers must accept state-approved Medicaid payment as payment in full and may not require that patients pay anything beyond that amount."

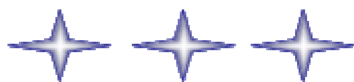
California invalidated two state statutes authorizing provider liens against Medicaid beneficiaries.[6] The statutes authorized providers to file liens against recoveries obtained by Medicaid beneficiaries even after the provider received Medicaid. The court found that the state statutes were preempted by federal legislation banning balance billing.

2. *Medicare.* Previously, Medicare had a prohibition against billing Medicare beneficiaries in excess of the payment made by Medicare. Participation has been limited to providers who agreed to accept Medicare as payment in full. Recent changes in the Medicare law[7] now permit a provider to bill a Medicare beneficiary or assert a lien against the beneficiary's recovery obtained from the tortfeasor by way of settlement or award.[8]

In the seminal case,[9] a hospital sought to recover from the Medicare patient more than it received from Medicare reimbursement. The 1st Circuit held that the fact that the patient recovered more than Medicare reimbursed the hospital did not entitle the hospital to charge the patient the difference between its full fee and Medicare's lower flat fee. The agreement between Medicare and the hospital was that in exchange for Medicare guaranteeing payment to the hospital, there would be no additional payment required from the Medicare beneficiary.

The recent changes now allow providers to bill the liability insurer or place a lien against the Medicare beneficiary's recovery.

[1] 42 U.S.C. §1396a(a)(25)(c); 42 C.F.R. §447.15; 42 U.S.C. §1320a-7b(d) .
[2] Evanston Hospital v. Hauck, 1 F.3d 540 (7th Cir. 1993).
[3] Mallo v. Public Health Trust of Dade County, 88 F.Supp.2d 1376 (S.D. Fla. 2000).
[4] Public Health Trust of Dade County v. Dade County School Board, 693 So.2d 562 (Fla. Dist. Ct. App. 1996).
[5] Spectrum v. Bowling, 410 F.3d 304 (6th Cir. 2005).
[6] Olszewski v. Scripps Health, 135 Cal. Rptr. 2d 1 (Cal. 2003).
[7] 68 Fed. Reg. 43940 (July 25, 2003).
[8] 42 C.F.R. 411.54(c)(2).
[9] Rybicki v. Hartley, 782 F.2d 260 (1st Cir. 1986).



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