The Brockovich - MSP Litigation: Coming to a Judicial Theater Near You?

Erin Brockovich, the former California paralegal who became the subject of a popular movie, has turned her attention to health care providers. Brockovich has lent her name to dozens of lawsuits alleging that certain health care providers have defrauded Medicare. While the Brockovich litigation is largely limited to the West Coast, health care providers throughout the country should take note. It could spread.

Since June 2006, Brockovich and other plaintiffs have filed more than 40 suits against hospital systems and nursing home chains alleging violations of the Medicare as Secondary Payor (MSP) provisions of the Medicare statute. Citing an Institute of Medicine study reporting that drug-related errors in the administration of medications cost $3.5 billion annually, the plaintiffs accuse health care providers of improperly billing Medicare for services involving medical errors and for services required as a result of medical errors.

The MSP provisions of the Medicare statute provide for a private right of action "in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with [the statute's coordination of benefits provisions establishing that Medicare shall be secondary to 'primary plans']." The statute defines a "primary plan" to include a "liability insurance policy or plan (including a self-insured plan)," and further provides that "an entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part." According to the Brockovich group, health care providers whose medical errors cause injuries to their patients are liable to their patients and, under the language of the statute, thus fit within the definition of "primary plan." As a result, they allege that health care providers - and not Medicare - are primarily responsible for the costs of caring for patients injured by medical errors.

The complaints do not identify or challenge specific Medicare bills, health care services or patients. Nonetheless, the Brockovich group seeks to recover twice the amount that the health care providers alleged were required to pay or reimburse Medicare, damages they claim the MSP provisions allow. These lawsuits have mostly been filed in California, but some have been filed in Florida, Arkansas and Pennsylvania. The defendants include large national and regional health systems, nursing home chains and other providers, including HCA, Tenet, Catholic Healthcare West, Daughters of Charity, Catholic Health Initiatives, Triad Hospitals, Adventist Health, Scripps Health, Sharp Healthcare, HealthSouth, Manor Care, Mariner Health and Beverley Enterprises.

Motions to Dismiss

A number of defendants have recently moved to dismiss, relying on three principal arguments:

(1) The plaintiffs lack standing to sue unless they were the patient involved. Under the United States Constitution, federal courts have jurisdiction only over "cases and controversies." If a plaintiff has not suffered an actual injury, the Supreme Court has held that there is no "case or controversy" and the plaintiff lacks standing. In these cases, the plaintiffs are not suing on account of any injury caused to them. Indeed, they are not even Medicare beneficiaries.

2) The defendants' liability has not yet been established; that is, the defendant hospitals, nursing homes and other providers are only alleged to have committed medical errors on Medicare beneficiaries, and only alleged to be liable for torts. There has not yet been a judgment or finding necessary to support the conclusion that they wrongly billed Medicare.

The MSP statute, however, was not intended to create a forum to litigate the underlying tort allegations and to open federal courts to what should be state tort litigation. In Glover v. Liggett Group, Inc., a recent case heard by the U.S. Circuit Court of Appeals for the 11th Circuit, the plaintiffs sued tobacco companies under the MSP provisions, contending that the tobacco companies were liable to pay for the costs of medical care for tobacco-related illnesses of Medicare beneficiaries. The 11th Circuit affirmed the dismissal of this case on the grounds that the tobacco companies were merely alleged tortfeasors and their liability had not yet been established. As the court put it, "[w]e conclude that an alleged tortfeasor's responsibility for payment of a Medicare beneficiary's medical costs must be established before an MSP private cause of action for failure to reimburse Medicare can correctly be brought . . . ." This timely and relevant decision will aid the Brockovich defendants in their motions to dismiss.

(3) The complaints should be dismissed because they are vague and excessively broad. In the Brockovich cases, the complaints do not allege any particular medical errors, any particular patients, any particular claims to Medicare or any other facts to put a health care provider on notice as to what it must defend. The plaintiffs' apparent strategy is to have the complaints survive motions to dismiss so that they can fish through the defendants' documents in search of information about medical errors to then build their case. Their complaints, for example, allege that information about supposed medical errors can be found in "patient complaints, staff complaints, internal incident reports and investigations, internal peer review, risk management programs and federally mandated hospital surveys."

Conclusion

In some respects, the Brockovich litigation resembles the wave of litigation commenced in 2004 (the NFP litigation) by prominent plaintiffs' attorneys alleging that not-for-profit hospitals had violated their income tax exemptions by allegedly charging uninsured patients excessive amounts and by allegedly engaging in improper collections practices. Both litigation initiatives involve well-funded plaintiffs making far-reaching allegations, under novel legal theories, against the health care industry. These tactics have worked in the past against tobacco companies, asbestos manufacturers, breast implant manufacturers, and other industries.

So far, the Brockovich litigation is primarily a West Coast phenomenon. Like the NFP litigation, however, it could easily and quickly spread to other parts of the country. For more information, please contact the Health Care group at Ropes & Gray.

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