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McKENNA TOXIC TORT NEWSLETTER

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The McKenna toxic tort practice group is pleased to provide this newsletter on recent developments in the toxic tort arena. This issue begins with a feature article discussing recent developments concerning Medicare reporting and right of recovery. Bob Pisani very nicely addresses the many confusing issues that have arisen out of the recently imposed requirements relating to Medicare. Tom Hayes has contributed an important update on legislative developments potentially impacting the statute of repose defense in Indiana asbestos and silica litigation, and an interesting update on developments on the asbestos front in Madison County and St. Clair County, Illinois. This issue concludes with an article discussing a new study suggesting that cell phone radiation may actually have some positive health effects. For further information, please feel free to contact the author listed for each article.

If you prefer to receive our newsletter electronically, please e-mail your request to Tom Hayes at thayes@mckenna-law.com. If there are individuals you would like us to add to our circulation list, please e-mail their mailing addresses or e-mail addresses to Tom Hayes. We would also welcome your comments on topics you would like to see addressed in our future newsletters.

You will also find this newsletter posted on our firm website: http://www.mckenna-law.com/. We invite you to visit our website to learn more about our firm and our toxic tort practice group.

Greg Cochran, 312-558-3935 or at gcochran@mckenna-law.com.

MEDICARE REPORTING AND RIGHT OF RECOVERY

For over a year, there has been much discussion about Medicare rights of recovery (sometimes referred to as a "superlien") in light of the reporting requirements imposed by Medicare in early 2009. At the time, Medicare established target enforcement dates of January 1, 2010 for reporting of settlements with Medicare eligible claimants and April 1, 2010 for reporting of Medicare eligible persons with pending claims and lawsuits. In February 2010, these deadlines were pushed back to October, 1, 2010 and January 1, 2011, respectively. As a result, there has been some pushback from some plaintiffs' attorneys regarding the notion of providing information required by Medicare. But more importantly, some plaintiffs' counsel argue that enforcement of Medicare's right of reimbursement has likewise been delayed. Although the regulatory duty to report has been delayed, Medicare's right of reimbursement remains and is not impacted by the changes to the reporting deadlines.

Defendants and their insurers' potential financial responsibility to Medicare remains if the sums paid to a plaintiff or claimant includes, as part of its basis, the cost of medical care related to the injuries claimed to be related to the defendant's conduct or products. This article discusses the basis for Medicare's right of reimbursement, the changes in the reporting deadlines and some ideas for dealing with common Medicare reporting related questions and issues.

To understand Medicare's right of reimbursement, one should understand the basis for Medicare's thought process related to their claim for reimbursement. In the context of an injury claim, Medicare sees the party responsible for an injury to be the primary payer and it, Medicare, as the secondary payer. Until the issue of responsibility is both identified and then resolved, Medicare is essentially advancing the cost of medical care that is actually the responsibility of others, and makes its payment of medical bills and costs conditional. When the "primary" payer is identified, Medicare wants the money it advanced to be repaid. Medicare will

first look to the plaintiff for reimbursement. But sometimes that money is spent or is otherwise unavailable, and the plaintiff has no other assets. In order to facilitate reimbursement, Congress has enabled Medicare to collect from the parties responsible for causing the injuries, which could be a defendant and/or its insurers.

This law often referenced as the Medicare Secondary Payer statute, 42 U.S.C. §1395y(b), which enables reimbursement from "primary payers" was effective December 5, 1980. This is a date as to which many of us have become familiar and is why this date is so important in latent disease cases. The Centers for Medicare and Medicaid Services ("CMS"), the entity created to enforce Medicare reporting and reimbursement, has indicated that while they want reporting on claimants who have only pre-December 5, 1980 exposures, CMS has also repeatedly stated that it will not seek reimbursement for injuries caused by exposures that ended before December 5, 1980. This policy decision has been reiterated most recently in the MMSEA Section 111 Liability Insurance No-Fault Insurance and Workers' Compensation User Guide, Version 3.0, Section 11.10.2 issued February 22, 2010. This is why we are beginning to see such things as statements in plaintiff depositions that no claims for post December 4, 1980 exposures are being made. One ramification of this policy decision by CMS is to avoid their conclusion that payments included exposures from December 5, 1980 or after, a release cannot indicate that the post December 4, 1980 exposures are being released.

Note that the only time a right of reimbursement exists is if the sums recovered include medical damages as an element of recoverable damages. For example, in Illinois in a wrongful death claim, the Wrongful Death Act does not include medical damages as a recoverable form of damages. The only damages recoverable under this Act are damages associated with the pecuniary loss by the next of kin. As such, there is no right of recovery by CMS and so such claims and claimants are not reportable to CMS. However, be careful of proposals to facilitate baseless allocations between causes of action to avoid Medicare reimbursement and those that do not. While CMS has no obligation to accept the parties' allocations in such circumstances, they should respect an allocation approved by a court of competent jurisdiction.

As was discussed in the recent NGHP Policy Teleconference hosted by CMS officials on March 16, 2010, the "touchstone" for reporting the identity of Medicare eligible claimants and any settlements with such persons is whether the settlement of a claim includes, as a basis, the amount of medical costs associated with the injury. An example given was a simple injury scenario when a claimant's glasses were destroyed and the need for replacement glasses arose. While the cost of replacing the glasses themselves may not need to be reported, if the claimant who was a Medicare recipient incurred the cost of an eye examination, payment of a claim which included the cost of this exam as a basis for the damage settlement would need to be reported.

As for reporting, the deadlines have been pushed back as discussed above. The initial and simplest form of reporting is for Responsible Reporting Entities ("RREs") to advise CMS of the identities of Medicare eligible claimants. This initial reporting is fairly simple: first and last name of the claimant, as well as the person's date of birth, gender, and social security number. Most of this information is obtained through routine discovery, and in some jurisdictions is part of the initial complaint or pleading that initiates the claim. This information is now to be reported on or before January 1, 2011 using the process that CMS has identified. The time between now and then is to be used for testing.

The other type of reporting is of settlements with Medicare eligible claimants, known as "total payment obligation to the claimant." CMS uses the acronym "TPOC" to describe this amount. The reporting of these sums is somewhat more complicated, and seeks not only such things as the amount of the payment, names, addresses and social security numbers (or tax identification numbers for claimants' counsel) of the claimant and his or her attorney, but also information about the injury or medical condition at issue in the claim, identified by the ICD-9 diagnostic and external cause of injury codes. Settlements now need to be reported beginning on October 1, 2010. There is no requirement to wait until the deadline to report.

There has been a fair amount of discussion about the need for set asides if a claimant is

continuing to treat after a settlement is reached. CMS has indicated they will typically use a retrospective focus, which is to say that once a settlement is reached, the focus on reimbursement as to each settlement is the time the settlement is reached. This is true so long as future payments designed to fund future medical care are not included. CMS has still not definitively determined how they will handle such situations.

In terms of practical issues, the main problem is that it is very hard if not impossible for the defendants or their insurers to know with certainty if a claimant has had medical costs related to the injury at issue paid by Medicare. If an RRE knew that there was no basis for a Medicare reimbursement claim, there would be no need to report and no need for concern about a reimbursement claim as the statute of limitations for such claims is six years. Further, HIPAA makes it very difficult for defendants and their insurers to access information from Medicare as to whether Medicare even has a right of reimbursement.

Although Medicare's right of reimbursement is actually not a lien, it is useful to think of it as one. CMS does have internal guidelines relating to the issue of compromising of the amount of reimbursement. Thus, like a lien, the amount of actual reimbursement that CMS will accept in consideration of agreeing not to pursue additional payments from a paying entity or claimant can be agreed upon. The amount that CMS will accept in total for reimbursement and/or as to given partial settlement may differ based on a number of factors CMS has identified in writing as what guides them in their compromise decisions. In theory, the right of reimbursement does not accrue until after the settlement is reached, but that is true with liens as well. The amount owed can and should be negotiated just like liens are negotiated. But, courts do not have jurisdiction to "adjudicate" the right of reimbursement.

Most plaintiffs' attorneys should be aware of the potential for Medicare reimbursement. Be aware that Medicare is often not the only entity with a right of reimbursement. If a plaintiff is injured and has health insurance paying medical bills related to the claim, there is often a provision in the health care policy requiring reimbursement for costs related to care rendered for injuries caused by others. Such reimbursement claims are often not disclosed to the defendant as neither the defendant nor its insurer has any repayment obligation. Like any potential lien recovery situation, the need to pay others out of the proceeds from a settlement is typically part of the claimant's settlement strategy. Obtaining some evidence of payment of Medicare's right of reimbursement should be possible, and is encouraged.

Whether settlement checks should list Medicare as a payee depends on the unique situation of each case. Defendants, insurers and their counsel need to make an individualized determination based on the likelihood of the claimant being Medicare eligible, whether Medicare actually paid for any of the medical care at issue, whether the medical care is causally related to the defendant's conduct or product and related issues. The settlement can be made contingent on one of more of these factors. Communication with plaintiff's counsel should be initiated early in the settlement process to see if there is a right of reimbursement. A waiver of the claimant's HIPAA rights can also be used to enable an attempt to determine whether Medicare has an interest in the settlement proceeds and if so what the claimed reimbursement amount is.

While a hold harmless agreement with plaintiff and/or plaintiff's counsel may appear to be a panacea, the fact is that the plaintiff may not be able to be located or even alive when Medicare asserts its subrogation rights. Even if available, the claimant may not have the funds to indemnify let alone defend the defendant or its insurer from a Medicare initiated subrogation claim. Further, in some states such as Illinois, there may be ethical issues associated with the plaintiff's attorney's agreement to indemnify or defend in such circumstances. One must be careful about relying on an agreement to "hold back" or not disperse settlement funds unless the entirety of the settlement amount is held back and is held in an account or trust that is solely controlled by the defendant or the insurers involved. The best practice is to be assured to the extent possible that there is either no right of reimbursement or that it has been satisfied.

There remains uncertainty as to how to deal with the Medicare right of reimbursement issue.

While there may not be one right answer, ignoring the situation is clearly not the solution. Hopefully in the not so distant future, answers to these questions will become both definitive and more apparent. We will keep you advised on what we learn.

For more information regarding these issues, please contact Bob Pisani at 312-558-3959 or via email at rpisani@mckenna-law.com.

INDIANA ASBESTOS/SILICA LITIGATION

Efforts in the Indiana state legislature to revive asbestos litigation begun last year have gained new momentum with the introduction of several new bills. The bills would essentially re-open any claim previously barred by the Indiana product liability and construction statutes of repose.

As previously reported herein, favorable court rulings on the product liability and construction statutes of repose in recent years have brought asbestos and silica litigation in the state to a virtual standstill. Senate and House bills originally proposed in January 2009 provided a bonus year to file an otherwise time-barred product liability cause of action based on an exposure to a hazardous substance. The bills also eliminated the "mining and selling" exception to the asbestos statute of repose. The original bills stalled after the Indiana Senate urged the Indiana General Assembly to first establish a study committee to research the issue of asbestos–related illnesses including a variety of related issues such as who should be held liable for asbestos claims, the appropriate length of time for suffering individuals to make a claim, and how asbestos affects the health of Indiana residents.

Digests of the new bills now in committee are as follows:

INTRODUCED SENATE BILL 297

Actions based on exposure to hazardous substances. Provides a statute of limitations for causes of action for occupational disease if the cause of action is based on an exposure to a hazardous substance. Provides for a product liability action against persons who mined or sold commercial asbestos products. (Current law provides for a product liability action against persons who mined and sold commercial asbestos.) Provides for a one year period, ending July 1, 2011, to file an otherwise time-barred cause of action for: (1) occupational disease based on an exposure to a hazardous substance; (2) personal injury, disability, disease, or death resulting from exposure to asbestos; or (3) property damage resulting from asbestos.

INTRODUCED SENATE BILL 330

Actions based on exposure to hazardous substances. Provides statutes of limitations for causes of action for occupational disease, deficiencies in the design, planning, supervision, construction, or observation of construction of an improvement to real property, and product liability when the cause of action is based on an exposure to a hazardous substance. Provides for a one year period, ending July 1, 2011, to file an otherwise time-barred cause of action based on an exposure to a hazardous substance.

INTRODUCED HOUSE BILL 1128

Occupational disease and asbestos actions. Provides a statute of limitations for causes of action for occupational disease. Provides for a product liability action against persons who mined or sold commercial products containing or using asbestos. (Current law provides for a product liability action against persons who mined and sold commercial asbestos.) Provides for a one year period, ending July 1, 2011, to file an otherwise time-barred cause of action for: (1) occupational disease; (2) personal injury, disability, disease, or death resulting from exposure to asbestos; or (3) property damage resulting from asbestos.

The House Bill was introduced by Democratic Representative Dennis Tyler on January 7, 2010 and has been sent to the Committee on Labor and Employment. Senate Bill 297 was introduced by Republican Senators Vaneta Becker and Brent Steele on January 11, 2010 and Senate Bill 330 was introduced by Democratic Senator Tim Lanane on the same date. Both Senate Bills have been sent to the Committee on Corrections, Criminal, and Civil Matters.

For additional information, contact Tom Hayes at (312) 558-3961, or by e-mail at thayes@mckenna-law.com.

SOUTHERN ILLINOIS ASBESTOS UPDATE

Madison County

Circuit Judge Barbara Crowder was chosen last month to oversee Madison County's asbestos docket upon the retirement of Judge Daniel Stack. Although no date for the change over has been announced, Judge Stack is due to retire at the end of his current term in December. He has handled the asbestos docket since 2004.

Judge Crowder was first elected to the bench in 1999. She will be taking over one of the busiest asbestos dockets in the nation. In 2009, a total of 814 asbestos cases were filed in Madison County by plaintiffs from all over the country, representing a 27 percent increase over the 639 cases filed in 2008.

Although the lead role will be new, Judge Crowder has been exposed to asbestos litigation in recent months. In that regard, she has handled the bi-monthly asbestos motion call for Judge Stack on a number of occasions, and just recently presided over the trial of a mesothelioma case against manufacturers of asbestos-containing brakes. The jury returned a defense verdict in favor of the sole remaining defendant, Ford Motor Company, on March 12th.

St. Clair County

Although it does not qualify as a flood of litigation just yet, the volume of asbestos cases now clogging the Madison County trial dockets through mid-2011 appears to have caused new asbestos cases to spill over into neighboring St. Clair County. As of March 23rd, *The Madison County/St. Clair Record* reports that eight new asbestos personal injury lawsuits have been filed in St. Clair County this year. As with many of the cases filed in Madison County, the newest cases filed in St. Clair County do not indicate the plaintiffs' states of residence.

POSITIVE HEALTH EFFECTS OF CELL PHONE RADIATION

We have previously reported on the potential adverse health effects of long-term cell phone radiation to include the development of brain tumors and other cancers. While scientists continue to debate the adverse effects, a new study suggests that cell phone radiation may actually have some positive health effects as well. In that regard, researchers at Florida Alzheimer's Disease Research Center report that studies performed on mice showed that radio waves may protect from and even reverse the effects of Alzheimer's disease.

Begun in early adulthood, researchers showed that cell phone exposure protects the memory of mice otherwise destined to develop Alzheimer's symptoms. The researchers showed that exposing old Alzheimer's mice to the electromagnetic waves generated by cell phones erased brain deposits of beta-amyloid, a protein strongly associated with Alzheimer's disease. Clumps of beta-amyloid form so-called brain plaques that are a hallmark of the disease. The scientists speculate that the cell phone radiation increases brain temperature, causing brain cells to release the harmful plaques. While studies performed with rodents do not always translate to useful human therapies, researchers suspect that a similar effect would show up in humans with the debilitating disease.

The study involved 96 mice, most of which were genetically altered to develop beta-amyloid plaques and memory problems mimicking Alzheimer's disease as they aged. Some mice were left as-is, so researchers could test the effects of the radiation on normal memory as well. Both the Alzheimer's and normal mice were exposed to the electromagnetic field generated by standard cell phone use for two 1-hour periods each day for seven to nine months. The mice were housed in cages arranged around a centrally-located antenna that generated a cell-phone signal. The cages were arranged at the same distance from the antenna and exposed to the radiation typically emitted by a cell phone pressed up against a human head.

Results showed that if cell phone exposure was started when the Alzheimer's mice were young adults (before signs of memory impairment were apparent), their cognitive ability was protected. In fact, the Alzheimer's mice performed as well on tests measuring memory and thinking skills as aged mice without dementia.

If older Alzheimer's mice already exhibiting memory problems were exposed to the cell phone radiation, their memory impairment disappeared. The researchers suggest this reversal may be due to the slight increase in brain temperature that they observed in the Alzheimer's mice after months of exposure to cell phones. The higher temperature may have helped the Alzheimer's brain to remove newly-formed beta-amyloid by causing brain cells to release it.

The cell phone exposure even boosted the memories of normal mice to above-normal levels. The memory benefits took months to show up, however, suggesting that a similar effect in humans would take years. The researchers suspect that the main reason for this improvement involves the ability of electromagnetic radiation to increase brain activity, promoting greater blood flow and increased energy metabolism in the brain.

The memory test used on the mice was designed from a test used to determine if Alzheimer's disease, or its very early signs of mild cognitive impairment, are present in humans. Researchers believe that their findings could have considerable relevance to humans since they selected electromagnetic parameters that were identical to human cell phone use and tested mice in a task closely analogous to a human memory test. As a result, they concluded that electromagnetic field exposure could help to prevent and treat Alzheimer's disease in humans and are currently evaluating whether different sets of electromagnetic frequencies and strengths will produce more rapid and even greater cognitive benefits than those found in their current study.

Meanwhile, the controversy about whether electromagnetic waves from cell phones cause brain cancer continues on. While many studies have found no risk, more recent "higher quality" studies did show an associated risk. The World Health Organization and the National Institutes of Health are still conducting research on the topic, and some countries have issued guidelines for cell phone use to include limiting use for children. The subject study, published in the January 6th issue of the Journal of Alzheimer's Disease, found no evidence of abnormal growth in brains of the Alzheimer's mice after many months of exposure to cell phone-level electromagnetic waves.

For additional information, contact Tom Hayes at (312) 558-3961, or by e-mail at thayes@mckenna-law.com.

McKenna Storer has offices located at:

33 North LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 558-3900

666 Russel Court
Suite 303
Woodstock, IL 60098
(815) 334-9690

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