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# Illinois' New Prompt Settlement Payment Act

**David H. Levitt**

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# 735 ILCS 5/2-2301



- **Effective January 1, 2014**
- Applies to any "personal injury, property damage, wrongful death or tort action involving a claim for money damages." Sec. 2-2301(a)
- Does not define "action" – does a lawsuit have to be pending? What about pre-suit settlements?
- "tort action" is not defined – but could apply to business torts as well.

## How Bob Clifford changed a state law

By ANDREW MALONEY  
LAW BULLETIN STAFF WRITER

Robert A. Clifford didn't set out to alter the Illinois legal landscape over dinner in Buffalo, N.Y., last year.

That's just what happened.

After a long day in court just before Thanksgiving, Clifford was dining at the upscale Buffalo Club with colleagues from his trial team, sharing notes and ideas in the crash case of Colgan Air Flight 3407, the Feb. 12, 2009, accident that killed 50 people just outside Buffalo. Clifford, the prominent trial attorney and a past president of The Chicago Bar Association, represents eight plaintiffs in the case.

He said he doesn't remember what he ate that night. Nor does he remember exactly how many people were there — about a half-dozen or so.

What he does recall is that it was too late to fly back to Chicago. And at some point, the conversation at his table centered around paying settlements.

"The business manager in me was lamenting the fact that it takes so darn long at times for these insurance companies to pay the settlements that they've agreed to pay to our clients," he said.

"And we have to fight with 'em and tussle with 'em and prod 'em and make motions against 'em. And one of them says, 'Why do you have to do that? Don't you have a prompt-pay law?'"

On that day, the answer to that question was "no." In four months, it will be "yes."

Gov. Patrick J. Quinn on Monday signed Senate Bill 1912, a replica of the New York statute which sets a timetable for paying settlements. The new law's origins function as a case study in how ideas can become law in Springfield.

Current Illinois law gives state courts discretion to enforce settlement payments in a timely manner.



Robert A. Clifford

As soon as Clifford saw a copy of the New York statute, the legislative grunt work began.

"I remarked to myself, 'We need one of those,'" said Clifford, a partner at Clifford Law Offices. "So I got back to Chicago and I called (Illinois Trial Lawyers Association Executive Director) Jim Collins. I told him the story and said, 'Let's go to work.'"

From there, Clifford and the trial lawyers group took the idea to the Legislative Reference Bureau, and in the course of enlisting sponsors, Clifford said, also took it to Senate President John J. Cullerton and House Speaker Michael J. Madigan.

In the bill's earliest stages, the trial lawyers took a straw poll of sorts among members to determine if the problem was widespread enough to push for legislation. The group got feedback from opponents as well, including those who represent municipal governments.

"We took into account all the points that they made," said Gregory L. Shevlin, a partner at Cook, Ysursa, Bartholomew, Brauer & Shevlin Ltd., who was ITLA president at the time. "We added in local government because there was concern that the original verbiage didn't make that clear enough, that local government entities are not subject to the bill.

"There was a lot of back-and-forth."

By the time the plan reached the House near the end of the General Assembly's spring session, the perception among many lawmakers, especially House Republicans, was just the opposite — they saw the bill as hasty, poorly-vetted and a display of power by Democrats in concert with ITLA.

"Oh yeah. I hated it," said Rep. Ronald L. Sandack, a Republican from Downers Grove and one of the House members who led the charge against the measure.

Among a host of his objections is that the timetable is unrealistic, and opponents didn't have enough time to negotiate it.

"I have no animus against the trial lawyers ... but it was just jammed down our throats," he said.

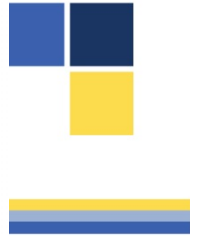
Shevlin said the lawmaking process involved increasing the number of days to pay the settlement — one of several compromises ITLA made while the bill was moving through the legislative process.

"One section said 21 days. Now it's 30. There were compromises like that," he said.

And Clifford said he disputes the perception that the bill is a power-grab.

"What's so novel about you wanting to be paid?" he said.

"When I became a plaintiff's lawyer, I learned there are the 3 Ds of defense — defend, delay, and don't pay. ... And that's the truth. Every lawyer involved in tort litigation knows 'defend, delay and don't pay.' ... And (this) is an effort to prevent that from continuing."



# The Statute



Section 5. The Code of Civil Procedure is amended by adding Part 23 to Article II as follows:

Sec. 2-2301. Settlement of claims; payment.

- (a) In a personal injury, property damage, wrongful death, or tort action involving a claim for money damages, a release must be tendered to the plaintiff by the settling defendant within 14 days of written confirmation of the settlement. Written confirmation includes all communication by written means.
- (b) In a personal injury, property damage, wrongful death, or tort action involving a claim for money damages in which the law requires court approval of a settlement, the plaintiff shall tender to the defendant a copy of the court order approving the settlement.

# The Statute



(c) In a personal injury, property damage, wrongful death, or tort action involving a claim for money damages in which there is a known third-party right of recovery or subrogation interest (including attorney's liens, healthcare provider liens, or rights of recovery claimed by Medicare, the Centers for Medicare and Medicaid Services, the Illinois Department of Healthcare and Family Services, or private health insurance companies), the plaintiff may protect the third-party's right of recovery or subrogation interest, where applicable, by tendering to the defendant:

# The Statute



- (1) A signed release of the attorney's lien.
- (2) Either:
  - (i) a signed release of a healthcare provider lien; or
  - (ii) a letter from the plaintiff's attorney agreeing to hold the full amount of the claimed lien in the plaintiff's attorney's client fund account pending final resolution of the lien amount; or
  - (iii) an offer that the defendant hold the full amount of the claimed right to recovery pending final resolution of the amount of the right of recovery; or
  - (iv) documentation of any other method of resolution of the liens as agreed by the parties.

# The Statute



## (3) Either:

(i) documentation of the agreement between the plaintiff and Medicare, the Centers for Medicare and Medicaid Services, the Illinois Department of Healthcare and Family Services, or the private health insurance company as to the amount of the settlement that will be accepted in satisfaction of right of recovery; or

(ii) a letter from the plaintiff's attorney agreeing to hold the full amount of the claimed right to recovery in the plaintiff's attorney's client fund account pending final resolution of the amount of the right to recovery; or

(iii) an offer that the defendant hold the full amount of the claimed right to recovery pending final resolution of the amount of the right of recovery; or

(iv) documentation of any other method of resolution of the liens as agreed by the parties.

# The Statute



(d) A settling defendant shall **pay** all sums due to the plaintiff **within 30 days of tender by the plaintiff** of the executed release and all applicable documents in compliance with subsections (a), (b), and (c) of this Section.

(e) If, after a hearing, the court having jurisdiction over the parties finds that timely payment has not been made by a defendant pursuant to subsection (d) of this Section, **judgment shall be entered against that defendant for the amount set forth in the executed release**, plus costs incurred in obtaining the judgment **and interest** at the rate specified under Section 2-1303 of this Code, **calculated from the date of the tender by the plaintiff** under subsection (d) of this Section.



# The Statute



(f) As used in this Section, "tender" means personal delivery or delivery by a means **providing a return receipt**.

(g) This Section applies to all personal injury, property damage, wrongful death, and tort actions involving a claim for money damages, **except as otherwise agreed by the parties**. This Section **does not apply** to:

- (1) **the State of Illinois**;
- (2) any State agency, board, or Commission, as defined in Section 1-7 of the Illinois State Auditing Act;
- (3) any State officer or employee sued in his or her official capacity;
- (4) any person or entity that is being represented by the Attorney General and provided indemnification by the State pursuant to the State Employee Indemnification Act;
- (5) **any municipality or unit of local government** as defined under Article VII of the Illinois Constitution; and
- (6) class action lawsuits.

Section 99. Effective date. This Act takes effect January 1, 2014.

# Issues with 2-2301



- Why was it passed? Any empirical evidence of delay by defendants in tendering release documents or paying after receiving executed releases?
- Remedy was already available – motion to enforce settlement.
- What is "written confirmation of the settlement"? Is an email sufficient if there is a means of "return receipt"?
- Complex cases and multiple defendants. Contribution and indemnity claims. Releases also required among defendants. What if the parties need more than 14 days to draft the documents because of the complexities? What if non-monetary relief is also included in the deal? What if someone is ill or on vacation?
- Structured Settlements – paperwork rarely completed within 14 days.

# Issues with 2-2301



- Note that State and municipalities are exempted – political decision? Constitutional issue (equal protection, special legislation – see *Best v. Taylor Machine Works*)?
- Insurer may be late in paying, but judgment is entered against the defendant.
- 30 days to pay seems ok, but what if there are multiple insurers, quota shares, London participants? Sometimes it takes more than 30 days. What if someone is on vacation?
- If late by one day, can plaintiff get a judgment against the defendant and get interest back to date of executed release?

# Issues with 2-2301



- Lien issues, including CMS/Medicare recovery:
  - **Plaintiff** is given the choice of how to handle, and includes merely sending a **letter** in which **plaintiff's attorney** agrees to hold the full amount of the lien pending final resolution.
  - No provision in the statute if plaintiff's attorney does not do it – but defendants still potentially liable to lien holder.
  - Fails to protect primary plans under MSP. In fact, liability can be for **twice** the Medicare payment.
  - No provision requires that plaintiff's attorney account to the defendants for these funds, or provide defendants with notice when the lien is satisfied. When can the defendant and its insurer close its file?

# MSP Act (42 USC §1395y(b), et seq.)



- Subsection 2: Medicare as Secondary Payer.
- (A) In general, payment may not be made with respect to any item or service where payment has been made, or can reasonably be expected to be made under an automobile or liability insurance policy or plan (including self-insured plan) or under no fault insurance
- (B) Except: The Secretary makes payment conditioned on reimbursement to Trust Fund
- (C) Repayment required by primary plan or any entity receiving payment.

# MSP Act (cont.)



- The United States may bring a cause of action for double damages against any and all entities that are or were required or responsible to make payment, and from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.
- The United States shall be subrogated to the extent of payment to any right of an individual or other entity
- There is a private cause of action for double damages where primary plan fails to provide payment or reimbursement

# Conditional Payment Recovery



- 42 CFR 411.24 (b), (e), (g), (h)(i)(1-2)
- CMS right to initiate recovery as soon as learns payment has been or could be made
- CMS has direct right of action to recover from primary payer
- CMS has right of action to recover from any entity including beneficiary, provider, supplier, physician, attorney, State agency, or private insurer

# Conditional Payment Recovery (cont)



- If Medicare is not reimbursed within 60 days of receipt of primary payment, then primary payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party.
- This applies if a primary payer makes its payment to an entity other than Medicare when it is or should be aware that Medicare has a conditional primary payment.



# Issues with 2-2301



- Plain language of Section (C)(3)(i) misconstrues when CMS right of recovery ripens
- Conflicts with "de facto" government policy to add Medicare as payee on third party checks
- Frustrates primary plans desire to add Medicare as payee due to complications accruing if fail to do so

# Strategy considerations



- When do you have a "settlement"?
- Every settlement offer must include a term opting out of the statute per 2-2301(g) ("except as otherwise agreed by the parties.").
- Consider – should all settlement offers only be made in writing, to document that opting out of the statute is a term of the agreement?
- If receive a written communication – email, fax, letter, text(?) – purporting to "confirm" a settlement, diligence is needed to respond to state that there is **not** a settlement.

# Strategy considerations



- Constitutional questions? Federal preemption?
- MSP full repayment obligations by operation of law against Plan, Anyone in Receipt of Funds
- Can you put the name of the lien holders or Medicare on the check?
  - CMS doesn't want to be on the check.
  - Is that a violation of the language of the statute?
- What if plaintiff won't agree to opt out?
  - Bad faith cases?
  - Conflict between insured and insurer?



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