



The Attorney General Authority Act

Section 1. {Title}. This Act may be known as the Attorney General Authority Act.

Section 2. {Purpose}. The purpose of this section is to provide that when the Legislature grants specific enforcement authority to the Attorney General, or sets forth an administrative process for private citizens to exhaust before, or in place of, court action, the Attorney General must act in accordance with that specific enforcement authority or, where applicable, follow that administrative process.

Section 3. {Scope of Attorney General Authority}. Whenever a specific act of the Legislature sets out the Attorney General's authority with regard to that act, the Attorney General's power with regard to that act shall only be that authority provided in that act, notwithstanding any other provision of law.

Section 4. {Attorney General to Follow Administrative Procedures}. Whenever the Attorney General is bringing a civil action on behalf of the citizens of the state pursuant to law, with regard to any method, act or practice of an entity that is regulated by a state agency or a federal agency, and the citizens of this state, would have to, by law, exhaust administrative remedies before such agency with regard to such method, act or practice if a citizen were bringing the action on his or her own behalf, then the Attorney General shall also have to exhaust administrative remedies before such state or federal agency and then seek judicial review in a court of law rather than bringing a direct action in court.

Section 5. {Rule of Construction}. The provisions of this Act do not expand any authority the Attorney General may have under law.

Explanation of ALEC Attorney General Authority Act

The Attorney General of a state is generally considered the chief legal officer of the state both in the civil and criminal context. Nevertheless, as with private attorneys, the Attorney General is still an attorney, and should follow the wishes of his or her client, the state, especially in the civil context where the Attorney General may have greater enforcement discretion. Just as a private attorney cannot bring a suit on behalf of a client without the client agreeing and authorizing such action, and then only within the guidelines allowed by the client, so it should be with the Attorney General. Rather than an Attorney General deciding on his or her own what authority the office may have to bring a lawsuit, the authority should be defined by the state as reflected by the specific decisions of the legislature via statute. The legislature, not the Attorney General, is best positioned to balance the competing concerns that go into the decision of whether to allow a cause of action and under what circumstances. The Attorney General Authority Act is designed to ensure enforcement of that legislatively granted power.

The Act provides that when the legislature decides that the Attorney General has a specific type of authority with regard to a particular enactment, it is the Attorney General's only authority. For example, if a state antitrust statute states on whose behalf the Attorney General can sue, the type of penalties that can be obtained, and the venue where the Attorney General can bring the suit, the Attorney General should not be able to avoid these parameters by relying upon common law authority, or some other general authority provided in statutory law. Rather, the Attorney General must rely on the authority given by that express statutory enactment.

The Act further provides that an Attorney General's authority cannot be applied in a manner in which he or she obtains greater ability to sue than an allegedly injured individual. Specifically, the Act states that the Attorney General must first seek relief before an administrative agency when suing on behalf of private citizens if the private citizen would have to first go to the administrative agency when bringing the action. For example, just as a citizen would usually have to go before the state Public Service Commission to challenge the reasonableness of a utility rate, so should the Attorney General when the Attorney General is suing on behalf of the citizens of the state to challenge the reasonableness of utility rates. The same principle would apply to the reasonableness of insurance contracts that have been approved by insurance regulators, and the reasonableness of banking procedures that are used pursuant to regulations issued by Banking Commissioners. In short, if a private citizen is required to exhaust administrative remedies because the legislature has determined that an administrative agency is better suited than a court to address a topic (at least in the first instance), then the Attorney General must do the same when suing on behalf of the citizens of the state.

In addition to these substantive provisions, the Act includes a general rule of construction designed to avoid confusion. The Act expressly states that it does not expand any authority that the Attorney General may have under the law.



Resolution in Support of Strengthening the Medicare Secondary Payer System

Summary

This resolution supports efforts to amend the federal Medicare secondary payer law (42 U.S.C. § 1395y(b)) by establishing clear procedures for parties to follow when reimbursing Medicare for payments made on behalf of its beneficiaries. Medicare conditionally pays medical expenses to ensure that beneficiaries receive proper care, and when this occurs Medicare is permitted to recoup such payments to the extent the payments are included in a personal injury claim against an alleged defendant, and that claim is resolved by a judgment or settlement. This reimbursement, however, is often delayed where the Medicare beneficiary is involved in litigation over his or her personal injury because the parties are uncertain as to the correct amount owed to Medicare, and Medicare does not provide the amount it expects to recover until after a judgment or settlement has been reached in the litigation. The result is uncertainty for all parties and an information bottleneck that impedes fair and efficient settlement of the claim. Further, there is currently no method by which a defendant can tender the correct amount owed to the Medicare beneficiary (or his or her attorney) without still being liable for the reimbursement amount in the event the beneficiary or attorney does not make the required reimbursement. This resolution urges Congress and the President of the United States to enact legislation to remove the costly bottleneck in the current system and provide certainty in how Medicare is repaid.

Resolution

PURPOSE: Urging Congress and the President of the United States to improve the federal Medicare secondary payer law (42 U.S.C. § 1395y(b)) by establishing clear rules and procedures for the beneficiaries or others to follow when reimbursing Medicare for payments made on behalf of Medicare's beneficiaries.

WHEREAS, the federal Medicare secondary payer law is an important law designed to protect the Medicare Trust Fund and ensure that Medicare pays only for medical expenses for which it is responsible; and

WHEREAS, Medicare beneficiaries periodically make claims seeking compensation for personal injuries that are covered by insurance plans or self-insured defendants, and these payers, under current law, are jointly liable with the Medicare beneficiary to repay Medicare in the event of a settlement of the claim or a judgment in favor of the claimant; and

WHEREAS, the manner in which Medicare secondary payer law is currently being administered with respect to claims involving individuals who are eligible for the Medicare Program has caused unnecessary delay and unfairness in the settlement of claims, and substantial additional transaction costs, which are often incurred by defendants or insurance companies, even though they are not Medicare beneficiaries and receive no benefit from Medicare payments to a claimant; and

WHEREAS, the delays in the settlement of claims and the uncertainty of the scope of the Medicare Program as the secondary payer has increased settlement costs for all parties involved in litigation regarding a Medicare beneficiary's personal injury; and

WHEREAS, the delay and uncertainty caused by the Medicare secondary payer law has increased costs to states and local jurisdictions; and

WHEREAS, the complexity of the current Medicare repayment system has prevented beneficiaries from being able to resolve their claims without assistance; and

WHEREAS, the Centers for Medicare & Medicaid Services (CMS) could greatly reduce the delays, uncertainty, costs, and complexity in the present system by providing more timely confirmation of conditional payments in which repayment is sought; and

WHEREAS, procedures that promote parties' timely notice of claims information to Medicare and focus collection efforts on the Medicare beneficiary could streamline the reimbursement process; and

WHEREAS, clear rules regarding the scope of parties' potential liability and responsibilities for compliance with the Medicare secondary payer law could provide certainty and consistency in how Medicare is repaid.

THEREFORE, BE IT RESOLVED, that the American Legislative Exchange Council supports amendment of the federal Medicare secondary payer law or the CMS' procedures that would:

1. Provide timely information on the existence of conditional payments, and the amount of such payments, to all parties involved; and
2. Provide simple, web-based, automated, self-service options to Medicare beneficiaries who receive a settlement, judgment, or payment to permit the beneficiary to calculate and repay the final conditional payment amount and to resolve compromised claims for future benefits; and
3. Provide a method by which a defendant can tender the correct amount owed to the Medicare beneficiary (or his or her attorney) without still being liable for the reimbursement amount in the event the beneficiary or attorney does not make the required reimbursement; and

4. Provide certainty in the parties' obligations by making the Medicare beneficiary primarily responsible for repayment of conditional payments and relieving insurers and other parties of such liability where timely reporting of claims information to the CMS occurs; and
5. Provide certainty for who is obligated to reimburse Medicare such that only persons who are entitled to Medicare at the time the claim is settled are responsible for reimbursement.

BE IT FURTHER RESOLVED, that the American Legislative Exchange Council encourages state courts and legislatures that have modeled laws and regulations based upon the federal Medicare secondary law to take similar action.