

Celebrity Brockovich plaintiff in two suits here

(06/25/06 San Diego Union Tribune, CA) By Keith Darcé

Erin Brockovich, the resourceful legal assistant made famous by Hollywood's depiction of her epic fight against Pacific Gas & Electric, now is going after two of San Diego's largest hospital operators. She is the plaintiff in a pair of lawsuits filed recently in San Diego Superior Court that claim Scripps Health and Sharp HealthCare charged Medicare millions of dollars for fixing mistakes made by hospital staffers.

The suits allege that the federal government's health insurance program for the elderly wrongly paid for treating infections, injuries, botched operations and illnesses.

"You are supposed to have your left leg operated on but they operate on your right leg," said Ken Connor, an attorney involved in the cases. "Medicare pays not only for the operation on your right leg, but for the one on your left leg as well."

Though hospitals are technically liable for the cost of their errors, Medicare often pays for the procedures on a contingency basis. But little or none of the money is ever repaid, according to the suits.

The San Diego cases are among 40 suits filed across the country in recent weeks by two law firms seeking to capitalize on a federal law that lets individuals sue on behalf of the federal government to recoup Medicare overpayments.

The suits seek reimbursement of those costs to Medicare, an amount that could reach into the billions of dollars according to one calculation. That money could help offset some of the skyrocketing costs predicted for the health insurance program in the coming years, according to Brockovich's lawyers.

Without specifying a dollar amount, the suits seek "double damages" or twice the amount paid by Medicare to the hospitals for the treatment in question.

Brockovich and the lawyers involved could pocket millions of dollars by sharing in reimbursement and damages ordered by the courts.

Spokesmen for Scripps and Sharp said they could not comment on the lawsuits because company executives had not yet been served with them. The lawyers targeted Scripps and Sharp because they are major players in the Southern California hospital market, said Connor. He works for Tampa, Fla.-based Wilkes & McHugh, one of two law firms steering the legal effort.

"Scripps and Sharp are both very large providers, and thousands of people come through them," he said.

Medicare payments make up 31 percent of revenue at Sharp's five hospitals and 17 percent of revenue at Scripps' five hospitals, said spokesmen for the health care systems.

Brockovich, who is represented by Girardi and Keese of Los Angeles, is suing the hospitals on behalf of the U.S. government in all of the California cases. Medicare and the federal government are not defendants.

"What Erin does by virtue of her name and reputation is help focus attention on what is a national problem," Connor said. "When you introduce Erin Brockovich into the mix, people start paying attention." Brockovich became a household name in 2000 when actress Julia Roberts portrayed her in a hit film that used her name as the title. Brockovich continues to work as a legal assistant at the Westlake Village law firm of Masry and Vititoe, and she keeps a busy schedule on the public speaking tour.

Masry and Vititoe is not involved in the Medicare cases.

Brockovich's star quality could play well with juries, said Shaun Martin, a professor at the University of San Diego School of Law.

"It may be a good strategy if you get to trial because jurors will be excited to see her, and they will know her reputation," he said.

Brockovich's assistant said last week that the celebrity paralegal was not available for comment.

The cases also give Brockovich a means of expanding her activism portfolio beyond environmental causes, said Jan Emerson, spokeswoman for the California Hospital Association, a hospital trade group.

"It's a misuse of the litigation system. There are no specific allegations of wrongdoing. There are no patients who have allegedly been harmed," Emerson said. "It's all about (Brockovich) because she doesn't want to be pigeonholed."

Connor said U.S. taxpayers for years have been footing a huge bill for hospital errors, known as "never events" in health care industry parlance.

Nationwide, about 3 percent of the 40 million Medicare beneficiaries who were admitted into hospitals between 2002 and 2004 required additional treatment because of hospital mistakes, according to a recent study by HealthGrades, a firm in Golden, Colo., that scores the performance of U.S. health-care facilities. Those errors cost Medicare \$9.3 billion, the study said.

Mark McClellan, head of the federal Centers for Medicare and Medicaid Services, told the U.S. Senate Finance Committee that the government could save hundreds of millions of dollars a year if Medicare stopped paying for hospital mistakes.

"As a necessary step toward encouraging better care and lower overall health care costs, we support further steps such as eliminating payments for never events," he said.

Connor said the lawsuits could force hospitals to take better care of patients, reduce the overall cost of health care and help slow down the increasing costs of the health insurance program for seniors.

"Why on earth should these hospitals keep profits that they never should have gotten because of substandard care? We are talking about billions and billions of dollars that should never have been paid," he said.

In addition to the San Diego suits, at least 33 other similar suits have been filed in California against hospitals and nursing homes in the counties of Fresno, Los Angeles, Orange, Riverside and San Bernardino.

Most of the cases nationwide have been filed in state courts, where they are more likely to receive a friendly hearing - particularly in California. Federal courts have handled more of these types of cases, and federal judges have become increasingly hostile to them, said Shaun Martin, a professor at the University of San Diego School of Law.

"California courts are lagging behind and often treat these suits more favorably," he said.

The suits are being brought under the Medicare Secondary Payer Statute, a law passed in the 1980s that bars the government from paying for medical treatment expected to be covered by an insurance company or another liable party.

Litigation under the statute is becoming more common.

The United Seniors Association filed suit last August against the nation's three biggest tobacco companies seeking damages on behalf of Medicare for the cost of treating diseases cause by smoking cigarettes.

The tobacco companies have asked a federal judge in Boston to dismiss the case.

Martin, the USD law school professor, said the Medicare cases are similar to whistle-blower suits that became popular with plaintiff lawyers in the 1980s.

"The reason they are so popular is because whoever brings the suit gets a share of the proceeds," Martin said.

"The hope with some plaintiff lawyers is that if you file 20 lawsuits, one of them might survive," the professor said. "A 1-in-20 chance of getting paid \$30 million might be worth throwing a lot against the wall to see what sticks."

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