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Plaintiffs and Medicare: Make Sure your Client Makes an Informed Decision by Mark R. Friedman

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If you are a personal injury attorney and represent a plaintiff who is on Medicare (or will be in the near future), it would be wise to ensure your client understands her obligations under the Medicare Secondary Payer Act (MSPA).

Conditional Payments

Under the MSPA (42 U.S.C. §1395y), Medicare will not make payments for which a tortfeasor is ultimately responsible. Where Medicare has already made such payments, the government will demand reimbursement.

Before a case settles (or a verdict is reached), Medicare may pay for a plaintiff's care that is related to the accident on which the lawsuit arises. Payments for accident-related care before settlement are called conditional payments, because they are conditioned on Medicare being repaid once the plaintiff recovers damages from the tortfeasor. Medicare has a right to be reimbursed for conditional payments, and may assert a lien against the settlement.

Plaintiffs and their attorneys would do well not to ignore Medicare liens, since attorneys can be held personally liable if the lien is not paid. Before settling a case in which a Medicare beneficiary is involved, plaintiff's counsel should check with the Centers for Medicare and Medicaid Services to see whether there will be a lien, and if so, how much.

Medicare Set-Aside

When settling a case, plaintiffs must protect Medicare's interest as a secondary payer.

The MSPA imposes obligations on plaintiffs who recover damages for future medical expenses. Plaintiffs who receive future medical damages are required to actually spend those

damages on accident-related care, before Medicare will pay for such care.

Plaintiffs can fulfill their MSPA obligations with a Medicare Set-aside Arrangement (MSA). An MSA is a trust or other arrangement that earmarks a portion of the settlement to fund future care costs. To establish an MSA, lawyers work with healthcare professionals to apply Medicare's formulas and guidelines and estimate the cost of future accident-related care. That amount is then held in a special MSA account used solely to pay for accident-related care. Once the MSA account is depleted, Medicare resumes paying for care.

If the plaintiff is also a Medicaid beneficiary, the MSA should usually be created in tandem with a special needs trust. MSA moneys, like all settlement moneys, will disqualify the plaintiff from Medicaid unless a well-drafted special needs trust is used.

Note that if no future medical care is needed, no MSA is needed. Plaintiffs can fulfill their MSPA obligations if all treating physicians certify that no further accident-related care is required, but the certifications must conform to Medicare guidelines.

The downside to an MSA is the plaintiff can only use the money in the account to pay for medical care, and not other needs. There are also fees to create and administer the MSA. However, plaintiffs and attorneys who fail to protect Medicare's secondary payer interests can face major consequences, as discussed further below.

Guidance from CMS

Guidance from the Centers for Medicare and Medicaid Services (CMS) on MSA's varies widely. For workers' compensation cases, CMS has published guidance and even created a formal review process. CMS will review a proposed Workers' Compensation MSA and advise whether the amount held in the MSA is sufficient, if the claimant is a Medicare beneficiary and the settlement is greater than \$25,000, or the claimant expects to be a Medicare beneficiary in the next 30 months and the settlement is greater than \$250,000.

By contrast, CMS hasn't offered any formal guidance on MSA in liability cases (personal injury, auto accidents, medical malpractice, etc.). Some CMS regional offices will review MSA's in liability cases, but not all. However, that doesn't mean CMS isn't thinking about liability cases. CMS has been working on a regulation for liability MSA's for several years, and issued a Notice of Proposed Rulemaking in 2013, which was withdrawn in 2014 after it failed to gain approval from the Office of Management and Budget. Presumably, CMS is working on a revised regulation now.

Inform your Client

In the absence of guidance from CMS, some attorneys feel that MSA's are not necessary in liability cases and ignore MSPA obligations when settling. In my view, that is a mistake that puts both attorney and client at risk, and could come back to haunt you.

Even though we don't yet have formal regulations on liability MSA's (although we probably will in the near future), the MSPA still creates obligations, and plaintiffs who ignore

them could face a nasty surprise. Insurers are required to report settlements to Medicare. If Medicare later determines that a plaintiff did not properly protect Medicare's interests as a secondary payer, Medicare may refuse to pay for care until the plaintiff spends her medicals damages (i.e., the amount that should have gone into an MSA, as determined by Medicare) on accident-related care. If the plaintiff has already spent the money, the plaintiff could be left with no money, no Medicare and no way to get Medicare. Those circumstances could easily give rise to a malpractice lawsuit.

In light of that bleak scenario, it seems prudent to at least give clients the opportunity to make an informed decision. Whether or not your client decides to establish an MSA, you should make sure he is informed as to what an MSA is, what it entails, why he would want one, why he wouldn't, and what might happen without one.

Conclusion

In any case involving a plaintiff who is a Medicare beneficiary (or will be within 2.5 years), attorneys should make their clients aware of MSPA obligations. An MSA isn't appropriate in every case, but it's often highly advisable - particularly when there is a substantial settlement, or where it's clear that future treatment related to the accident will be required. A special needs attorney can help create an MSA, but even if your client decides not to go forward with one, she should at least be given enough information to weigh her options and make an informed decision.

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